1-1-2010

Fractured Membership: Deconstructing Territoriality to Secure Rights and Remedies for the Undocumented Worker

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FRACTURED MEMBERSHIP: DECONSTRUCTING TERRITORIALITY TO SECURE RIGHTS AND REMEDIES FOR THE UNDOCUMENTED WORKER

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Relied upon but unwelcome, among us but uninvited, undocumented workers in the United States—now numbering over 8 million—labor on the border of inclusion and exclusion, between a status-based conception of membership and a territorial approach to membership. Although mere presence in the U.S. secures undocumented workers many of the same labor protections afforded to authorized workers, undocumented status often forecloses certain remedies otherwise available for employer breaches of those protections. Many commentators have criticized this effective status-based denial of rights to undocumented workers as inimical to the goals underlying labor and immigration law. While this Article echoes some of those sentiments, its purpose is broader.

This Article bases its critique of the slow encroachment of a status-based conception of membership into the employment sphere on its failure to recognize fundamental indicators of membership, including an individual's ties to the surrounding community, that have historically shaped notions of membership. However, this Article does not advocate the use of the historically dominant territorial model, which distributes rights based on mere territorial presence. It suggests that territoriality, applied in an increasingly globalized world in which relationships and obligations are not dictated by physical borders, can no longer adequately answer questions of membership. Rather, this Article offers a more principled, nuanced approach—one that arguably is already emerging outside the employment context—derived from territoriality's underlying rationales but stripped of that approach's fixation on geography, to secure the rights of undocumented workers.

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* Visiting Assistant Professor of Law, J. Reuben Clark Law School, Brigham Young University. Many thanks to Michael Olivas, RonNell Andersen Jones, Lisa Sun, Gordon Smith, Fred Gedicks, and Kif Augustine-Adams, as well as to those who participated in the University of Houston Law Center colloquium session at which I presented an earlier draft of this Article, for insightful comments, ideas, and motivation. Kyle Bringhurst, Eric Clarke, and Laura Wahlquist provided phenomenal research assistance.

INTRODUCTION

The United States workforce includes over 8 million undocumented immigrants.[1] They work in the shadows to evade deportation, and they accept jobs and working conditions that their documented counterparts will not.[2] As invisible as their day-to-day

1. JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CENTER, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 12 (2009).

2. Because of understandable underreporting, there are few statistics to document the grim working conditions experienced by immigrants, especially undocumented immigrants. The few that exist paint a bleak picture. For example, in 2000, of the 111 people who died on the job in New York City, 74 were immigrant workers. Thomas Maier, *Surge in Immigrant Worker Deaths*, NEWSDAY, Oct. 29,

work may be, undocumented workers are an integral, though unsanctioned, part of the U.S. economy. They build our houses, tend our crops, and slaughter our livestock.[3] They help satiate the American craving for affordable abundance. At the same time, unauthorized immigrants are not supposed to be here, and their mere presence undermines our understanding of community and membership. Relied upon but unwelcome, among us but uninvited, undocumented workers labor on the border of inclusion and exclusion and are the subjects of a series of historically reemerging questions: When and how much should immigration status matter? Does being here count for anything? Who belongs? Who is a member?

Over the course of U.S. history, the law has developed some answers to these questions. In many contexts outside the specific realm of immigration law, undocumented immigrants have enjoyed virtually all of the same rights and privileges—and therefore membership—as their documented counterparts. For example, all individuals present in the United States, regardless of immigration status, share the right to enter into contracts, the right to marry, and the right to equal protection under the law. In these contexts, being here—mere presence within the U.S.—confers some level of membership in our society. In other contexts, undocumented immigrants are wholly excluded from membership rights by their lack of authorized status. Our current understanding of the right to vote, for example, fits into this scheme: we generally reserve voting for citizens and exclude all others, including undocumented immigrants.[4] Likewise, we exclude

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2001, at A14. Immigrant dishwashers in Long Island earned an average of $2.50 an hour and worked over 75 hours a week in 1999. JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 2 (2005).

3. Undocumented workers make up 5.4 percent of the U.S. workforce but represent 19 percent of the animal slaughter and processing industry and 28 percent of the landscaping services industry. PASSEL & COHN, *supra* note 1, at 32. *See generally* GORDON, *supra* note 2 (discussing working conditions experienced by today's immigrants in the "new sweatshops"); *see also* JEFFERY S. PASSEL, PEW HISPANIC CENTER, THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. 11 (2006) ("The share of unauthorized employed in agricultural occupations (4%) and construction and extractive occupations (19%) was about three times the share of native workers in these types of jobs.").

4. Although modern commentators and historians dispute the assumption that voting was limited to citizens in American colonial and early U.S. history, they agree that aliens were, with minor exceptions, excluded from the voting franchise by the early decades of the nineteenth century. *See* GERALD NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 63–71 (1996) (describing the voting franchise's increasingly more exclusionary treatment of aliens in the United States); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1096 (1977) (cataloging the increasing effort of state voting laws to exclude aliens).

undocumented immigrants from many federal welfare benefits.[5] These opposing examples highlight the tension between valuing formal membership in our society, represented by authorized status, and recognizing de facto membership through presence within the country's geographic borders. These two approaches to membership—what Linda Bosniak and others have called the territorial and status-based approaches—have dominated the distribution of rights and benefits to aliens in the U.S.[6]

In the employment context, however, the undocumented immigrant finds herself in an anomalous situation. On one hand, we recognize undocumented immigrants' de facto membership in the U.S. workforce and their participation in our economy by affording them protection under federal and most state employment law schemes. By virtue of their territorial presence, undocumented workers have the statutorily secured right to participate in labor unions,[7] the right to non-discriminatory treatment in the workplace,[8] and the right to compensation for work-related injury through workers' compensation programs or tort claims.[9] However, we denounce undocumented

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5. The 1996 Welfare Act limits the distribution of public federal benefits, including welfare, health, and unemployment benefits, to "qualified aliens," which excludes undocumented immigrants. *See, e.g.*, 8 U.S.C. § 1611(a) (2006) ("Notwithstanding any other provision of law . . . an alien who is not a qualified alien . . . is not eligible for any Federal public benefit."); 8 U.S.C. § 1641 (2006) (defining "qualified aliens"). Some exceptions include emergency medical assistance and non-cash emergency disaster relief. *See* 8 U.S.C. § 1611(b)(1)(A)-(B) (2006). Even authorized permanent residents are barred from Federal means-tested public benefits for five years after admission into the United States. 8 U.S.C. § 1613 (2006).

6. *See, e.g.*, Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQUIRIES L. 389 (2007) [hereinafter Bosniak, *Being Here*].

7. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984) (upholding the NLRB's ruling that undocumented immigrants are protected under the NLRA); *Agri Processor Co. v. NLRB*, 514 F.3d 1, 2 (D.C. Cir. 2008) (holding that a company cannot refuse to bargain with employees seeking to unionize because the employees are undocumented workers).

8. *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065–66 (9th Cir. 2004) (holding that NIBCO cannot use the discovery process to seek documents regarding Rivera's immigration status because it would chill Title VII claims by undocumented workers); *Iweala v. Operational Techs. Servs.*, 634 F. Supp. 2d 73, 80 (D.D.C. 2009) (holding that Title VII protections apply to undocumented workers). *Contra Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 187–88 (4th Cir. 1998) (holding that Title VII protections are not available if the employee was not authorized for employment).

9. Anne Marie O'Donovan, *Immigrant Workers and Workers' Compensation After* Hoffman Plastic Compounds, Inc. v. N.L.R.B., 30 N.Y.U. REV. L. & SOC. CHANGE 299, 300 (2006) ("In the workers' compensation context, for example, state courts and agencies have overwhelmingly upheld the rights of undocumented immigrants to receive benefits. . . ."); *see also* Katrina C. Gonzales, Note, *Undocumented Immigrants and Workers' Compensation: Rejecting Federal Preemption*

workers' unauthorized presence within our borders by excluding them from many of the remedies available for employers' violations of those very rights. An undocumented worker in Texas, for example, may be nominally protected under the state's employment discrimination law, but unable to recover any lost wages for his employer's blatantly discriminatory termination of his employment.[10] Likewise, an undocumented worker that has been fired for filing a lawsuit to recover unpaid wages may be compensated for work already performed, but has no access to the Fair Labor Standard Act's provision of back pay—compensation for work that would have been performed if the employee had not been illegally fired.[11] In effect, this means there is no compensatory remedy for the retaliatory discharge itself.

Thus, when it comes to enforcing their right to labor protections, undocumented immigrants find that status often displaces territorial presence as the ultimate determinant of membership. Their membership is fractured by the collision of two membership models: undocumented immigrants' territorial presence guarantees nominal membership, but their status may preclude enjoyment of full membership rights. In large part, this fractured membership scheme derives from the U.S. Supreme Court's opinion in *Hoffman Plastic Compounds, Inc. v. NLRB*,[12] where the Court reaffirmed the inclusion of undocumented immigrants as protected employees under the National Labor Relations Act but denied their access to the remedy of back pay.[13]

Many commentators have criticized *Hoffman*'s effective denial of rights guaranteed by the NLRA and its broader effect on labor and employment law.[14] They decry the Court's dissonant treatment of

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of the California Workers' Compensation Act, 41 U.C. DAVIS L. REV. 2001, 2004–05 (2008) (noting that there is considerable variance from state to state regarding treatment of undocumented employees' workers' compensation claims, but California does offer protections to undocumented workers).

10. *See Escobar v. Spartan Sec. Serv.*, 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003) (concluding that claimant "is not entitled to back pay on his claims under Title VII, such a remedy being foreclosed by the fact that he was an undocumented worker at the time he was employed by Spartan"). *See also Crespo v. Evergo Corp.*, 841 A.2d 471, 477 (N.J. Super. Ct. App. Div. 2004) (holding that economic and non-economic damages are not available to undocumented immigrant under New Jersey anti-discrimination law where employee was not allowed to return after parental leave).

11. *See Renteria v. Italia Foods, Inc.*, No. 02-C-495, 2003 WL 21995190, at *2, 6 (N.D. Ill. Aug. 21, 2003).

12. 535 U.S. 137 (2002).

13. *Id.* at 151–52.

14. *See, e.g.*, Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth Amendment*, 41 CORNELL INT'L L.J. 27, 28–29 (2008) (arguing that *Hoffman* places undocumented immigrants in the "shadow of the American Legal System"); Nhan T. Vu & Jeff Schwartz, *Workplace Rights and Illegal Immigration: How Implied Repeal Analysis Cuts Through the Haze of* Hoffman Plastic, *its*

undocumented workers as inimical to the goals underlying labor and immigration law.[15] Although I generally agree with and briefly echo some of those sentiments here, my goal in this Article is broader. Here, I base my critique of undocumented workers' effective status-based exclusion from workplace protections on such a scheme's failure to recognize fundamental indicators of membership, including an individual's ties to the surrounding community, as well as concerns over the preservation of the community's character that have shaped and continue to shape our distribution of rights and benefits in contexts outside of the labor and employment sphere.

Rather than advocate for a return to strict territoriality as a normative model for the distribution of employment rights and benefits, however, I suggest the application of a new approach—one derived from territoriality's underlying rationales but stripped of its ties to geography—that I see emerging outside the employment context. I argue that although territoriality's demise in the employment sphere superficially resembles territoriality's decline outside of the employment sphere, the two trajectories are not parallel.

Ultimately, I show that in the employment sphere, territoriality is giving way to a more formalistic approach—a status-based model—while territoriality, as it applies more generally, has undergone a transformation toward a more principled, more nuanced, post-territorial approach that takes into account an individual's community ties, the surrounding community's obligations to individuals subject to its laws, and the importance of preserving the surrounding community's character. Echoing Michael Walzer's foundational argument that membership should be analyzed with reference to the rights being distributed and should be allocated according to mechanisms that

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Predecessors and its Progeny, 29 BERKELEY J. EMP. & LAB. L. 1, 1-2 (2008) (arguing the Court reached the wrong conclusion in *Hoffman*); David Weissbrodt, *Remedies for Undocumented Noncitizens in the Workplace: Using International Law to Narrow the Holdings of* Hoffman Plastic Compounds, Inc. v. NLRB, 92 MINN. L. REV. 1424, 1424 (2008) (noting severe criticism of *Hoffman* by the Inter-American Court of Human Rights and the International Labor Organization Freedom of Association Committee).

15. *See, e.g.*, Sarah Cleveland et al., *Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Law Remedies are Restricted Based on Workers' Migrant Status*, 1 SEATTLE J. FOR SOC. JUST. 795, 802 (2003) (arguing that employers are incentivized to hire undocumented workers because the employers suffer no significant penalty for violating the law); Cunningham-Parmeter, *supra* note 14, at 34–35 (noting that critics have "charged that [*Hoffman*] encouraged employers to hire unauthorized immigrants"); Vu & Schwartz, *supra* note 14, at 27–28 (arguing that awarding back pay to undocumented immigrants would further employment law goals, as well as immigration law goals, such that application of the NLRA's back pay provision as well as IRCA's prohibition on the hiring of undocumented workers are not mutually exclusive).

recognize and reward fundamental indicators of membership in that particular sphere of membership,[16] I argue that labor and employment rights should not be afforded to undocumented workers because of mere territorial presence or status. Rather, I argue that the post-territorial model more adequately distributes rights according to concerns relevant to the sphere of employment, where membership cannot be adequately measured by mere territorial presence or immigration status.

To reach my conclusions, I begin my analysis in Part I with a description of territoriality and a brief discussion of its foundations, including Michael Walzer's concept of complex equality. I compare territoriality to the status-based model and examine territoriality's rationales and theoretical underpinnings. In analyzing territoriality's rationales, I expose some of its weaknesses and conclude that territoriality, if applied strictly in a modern setting—one in which personal relationships and obligations are not exclusively determined by geographic boundaries—does not distribute membership rights in a way that is consistent with its underlying rationales.

In Part II, I trace the trajectory of territoriality's past and current influence in U.S. law outside the labor and employment context, examining territoriality's inclusionary side—its automatic bestowal of membership on everyone within U.S. boundaries—as well as its exclusionary side—its automatic denial of membership to those outside of the boundaries. I focus on courts' rationales for applying territoriality and, later, as territoriality's influence has waned, their reasons for abandoning territoriality. I suggest that a new, post-territorial conception of membership, distilled from the very rationales that once shaped strict territoriality, is displacing strict territoriality outside of the employment context.

Part III catalogues territoriality's waning role in the distribution of employment rights and benefits and criticizes the status-based model's encroachment into the employment sphere. I propose that the post-territorial model that appears to be developing in the non-employment context be applied in the employment context as well to ensure that all employees, regardless of immigration status, have access to the same remedies for violations of employment law.

Finally, I offer my conclusions and some questions for the future.

16. *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 3–30 (1983).

I. THE CONCEPT OF MEMBERSHIP

The distribution of rights, regardless of type, boils down to a single question: who belongs? This question follows naturally from the assumption, one that I will not challenge here, that members—those who belong—deserve a certain type of treatment, and those who are not members deserve another.[17] After all, distinguishing between members and non-members would become meaningless if there were no reward for membership.[18] In that sense, the distribution of membership rights is also an exclusionary process: it is as much about determining who *does not* belong as it is about determining who *does* belong.

We thus make rules to govern our selection of members. In this Part, I focus on those rules—on the way states decide who is and who is not a member—and on their fitness for their assigned task of separating members from nonmembers. I begin with a description and comparison of the territorial and status-based models, which have significantly influenced alienage and immigration law over the course of U.S. history. I then briefly discuss Michael Walzer's theory of complex equality, which posits that goods, including rights, benefits, and privileges, should be distributed according to criteria that are intrinsically related to the good being distributed.[19] Finally, I argue that territoriality no longer distributes rights in a way that relates to the goods being distributed. This sets the stage for Part II, in which I trace territoriality's trajectory outside of the employment sphere to track its waning role in U.S. law and propose that a newer, post-territorial model is emerging to account for the problems inherent in territoriality as applied today.

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17. *Cf.* Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 3 STAN. J. C.R. & C.L. 165, 166–67, 189–90 (2007) (discussing immigration control as governing membership in American society). *See generally* RAINER BAUBÖCK, TRANSNATIONAL CITIZENSHIP: MEMBERSHIP AND RIGHTS IN INTERNATIONAL MIGRATION (1994).

18. *See, e.g.*, DAVID JACOBSON, RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP (1996) (forecasting a significant devaluation of citizenship due to an increase in transnational migration that, in turn, is causing a the sovereign state to shift "from an entity that embodies the people's will (national self-determination) to an entity that advances transnational rights"); WALZER, *supra* note 16, at 64 ("Membership is important because of what the members of a political community owe to one another and to no one else, or to no one else in the same degree."); Peter Shuck, *The Re-Evaluation of American Citizenship*, 12 GEO. IMMIGR. L.J. 1, 12 (1997) (discussing the resurgence of citizenship as a valuable status due to Congress's withdrawals of certain rights and benefits, including welfare benefits, from noncitizens).

19. WALZER, *supra* note 16, at 17–20.

A. Competing Membership Models

In the United States, two competing approaches to membership have historically coexisted.[20] The status-based approach values formal, legal admission to the U.S.,[21] while territoriality values de facto membership as evidenced by physical presence within the country's borders.[22] For citizens and authorized immigrants, the model used to distribute rights is inconsequential—whether an individual enjoys rights because of her territorial presence or because of her state-sanctioned status is largely a theoretical question without practical impact. For unauthorized immigrants, however, the model used means the difference between inclusion and exclusion, rights and no rights.

The status-based and territorial models each provide a sorting mechanism—a rule—for dividing members from nonmembers. Broadly speaking, territoriality distributes membership rights and benefits according to geographic boundaries.[23] Individuals on the "in" side of the boundary are members, and those on the "out" side are nonmembers. The territorial conception of membership is thus a binary one: individuals are either members, who enjoy the full suite of membership rights available, or nonmembers, who enjoy none.[24]

In contrast, the status-based model distributes membership rights based on an individual's legal status, with increasing membership rights afforded as an individual ascends the membership "ladder."[25] Unlike

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20. *See* Bosniak, *Being Here*, *supra* note 6, at 389–92.

21. *See id.*

22. *See id.* This categorization of the models largely follows Linda Bosniak's terminology in *Being Here*, *supra* note 6, at 390–92. However, these models, although under different names and slightly different variations, have been discussed elsewhere. *See, e.g.*, NEUMAN, *supra* note 4, at 6–8 (dividing approaches to the distribution of constitutional rights into membership approaches, mutuality approaches, universality, and global due process); *see also* Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 1031 [hereinafter Bosniak, *Exclusion*]; Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1101–10 (1994) [hereinafter Bosniak, *Membership*] (referring to the territorial and status-based models as "separation" and "convergence" to highlight territoriality's separation of border control and rights distribution as well as the status-based model's collapse of those questions into a single question about status).

23. *See* NEUMAN, *supra* note 4, at 7 (describing broad categories of models for the distribution of constitutional rights, including territoriality, in which "the Constitution constrains the United States government only when it acts within the borders of the United States"); Bosniak, *Being Here*, *supra* note 6, at 390; Laura Oren, Comment, *The Legal Status of Undocumented Aliens: In Search of a Consistent Theory*, 16 HOUS. L. REV. 667, 669 (1979) (discussing and comparing the territorial and status-based approaches to undocumented immigrants).

24. Bosniak, *Being Here*, *supra* note 6, at 390–91.

25. *Id.*

the territorial model, a status-based model presupposes multiple levels of membership and a broad spectrum of membership packages. In the United States, for example, an individual may be, among many alternatives, an undocumented immigrant, a visitor for pleasure, a temporary worker, a permanent legal resident, or a citizen.[26] Under the status-based model, each status would correspond to a set of membership rights and benefits, with citizenship corresponding to the full suite of membership rights available.[27]

Although the status-based model is appealing in its recognition of various levels of membership, it is based entirely on the nation-state's unilateral decision to designate someone a member. State consent is a fundamental prerequisite to membership under the status-based model. Territoriality depends not upon the state's consent, but upon the individual's actions—her choice to remain within the boundaries of the state. It is this immigrant-focused inclusiveness that has made territoriality a favorite among commentators.[28]

However, while broad inclusiveness is territoriality's most identifiable characteristic, that inclusiveness extends only to the state's border, at which point territoriality morphs into a rule of exclusion.[29] Because the border marks the dividing line between members and nonmembers, the border is the site of the nation-state's control over membership.[30] Thus, territoriality does not amount to an open-border policy. Even the most enthusiastic supporters of the territorial model admit that a state has the right and obligation to control the composition of the state by regulating who crosses its borders.[31] At the border, the

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26. The various categories of aliens authorized to be in the United States are catalogued in the Immigration and Nationality Act. *See* U.S.C. § 1101(a)(15) (2006) (nonimmigrant aliens, including visitors for pleasure and temporary workers), *id.* § 1101(a)(20) (2006) (aliens lawfully admitted for permanent residence).

27. *See* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 1-2 (6th ed. 2008) (depicting the various levels of membership in the status-based model as concentric circles of membership, with citizens forming the core membership ring).

28. Bosniak, *Being Here*, *supra* note 6, at 389-90; Joseph H. Carens, *On Belonging: What We Owe People Who Stay*, BOSTON REV., Summer 2005, at 16; Owen Fiss, *The Immigrant as Pariah*, BOSTON REV. Oct.-Nov. 1998, at 4.

29. In Linda Bosniak's terms, this is a "separation," rather than a "convergence" approach because the decision of whether to allow someone in is separate from the decision of what rights to give that person once he is on the inside. Bosniak, *Membership*, *supra* note 22, at 1101-10.

30. WALZER, *supra* note 16, at 61-63 (distinguishing the control of admissions from the distribution of rights within the territory).

31. *See, e.g.*, *id.* at 31 ("The idea of distributive justice presupposes a bounded world within which distributions take place: a group of people committed to dividing, exchanging, and sharing social goods, first of all among themselves."); Bosniak, *Exclusion*, *supra* note 22, at 963 ("Exclusion at the borders, in other words, is

state may select among applicants for admission based on the criteria of its choosing.[32] However, under a strictly territorial approach, once an individual has entered the territory, the state is obligated to afford her membership rights.[33]

B. Territoriality and Complex Equality

Michael Walzer's theory of complex equality, which has become a foundation for modern discussions of territoriality and membership,[34] explains territoriality's seemingly inconsistent approach to membership in which the state must treat individuals within its borders as members regardless of what the state's decision regarding that individual might have been at the border.[35] Complex equality describes a system in which goods—including intangibles such as love, honor, and power—are distributed to individuals without regard to the individual's possession or lack of another good.[36] This is a familiar and instinctive concept that orders our everyday membership questions. An individual is not entitled to city library borrowing privileges, for example, by virtue of her Rotary Club membership.

Rather, complex equality requires that there be an "intrinsic connection" between the good distributed and the principle of distribution.[37] Thus, from my earlier example, the separation of the Rotary Club from city library privileges indicates a judgment that community leadership, required for membership in the Rotary Club, is not intrinsically related to responsible library patronage. Walzer sums up complex equality: "*No social good* x *should be distributed to men and women who possess some other good* y *merely because they possess* y *and without regard to the meaning of* x."[38]

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a necessary condition of a thriving membership within."). *But see* Mark Tushnet, *Open Borders*, BOSTON REV., Oct.-Nov. 1998, at 18, 18 ("[T]he long-term goal of immigration policy should be open borders and fairly easy naturalization . . . .").

32. *See* WALZER, *supra* note 16, at 33–35.

33. *See id.*; Bosniak, *Being Here*, *supra* note 6, at 395–96.

34. *See* LINDA BOSNIAK, THE CITIZEN AND THE ALIEN 49 (2006) (noting the "enormous contribution" Walzer made to "theoretical debates on immigration across the disciplines").

35. *See* WALZER, *supra* note 16, at 63 (insisting that admission and alienage law "must vindicate at one and the same time the (limited) right of closure and the political inclusiveness of the existing communities"). Linda Bosniak refers to this as the "hard on the outside and soft on the inside" quality of territoriality. *See* BOSNIAK, THE CITIZEN AND THE ALIEN, *supra* note 34, at 4; Bosniak, *Being Here*, *supra* note 6, at 392, 395–96.

36. WALZER, *supra* note 16, at 17–18.

37. *Id.* at 19.

38. *Id.* at 20.

From this foundational proposition, Walzer argues that the decision to formally admit someone into the territory—to afford someone a legal status—should remain separate from the decision to distribute membership rights available within the territory because those goods are not necessarily intrinsically related.[39] The goods being distributed in each decision, for Walzer, belong to different "spheres" of distributive justice because the state's decision to admit an individual *into the territory* may properly be decided by political will,[40] but a state's power to distribute rights *within* the territory is "entirely constrained" by moral concerns.[41] In more simplistic terms, formal membership in the polity is a separate, unrelated question from membership in the community—they are different clubs.

As I describe in Part II, Walzer's conception of membership holds true in many aspects of U.S. law. Many laws that do not directly govern the movement of people across borders have been governed by territoriality. Thus, aliens, both documented and undocumented, have traditionally been afforded extensive rights on account of their presence within U.S. borders despite not having been afforded a legal status (a good distributed in a different sphere).[42]

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39. *Id.* at 31-63.

40. *See id.* at 31. Although Walzer ascribes the state's power to admit individuals at the border to its right of political will—"Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination"—he acknowledges that this power is also bounded by other principles, including the principle of mutual aid, which requires the state to provide assistance to a stranger where the assistance is urgently required and poses no risk to the assisting state. *Id.* at 33, 45. *See id.* at 62 ("But self-determination in the sphere of membership is not absolute.").

41. *Id.* at 62 ("Immigration, then, is both a matter of political choice and moral constraint. . . . [T]he rule of citizens over non-citizens, of members over strangers, is probably the most common form of tyranny in human history.").

42. Linda Bosniak has written extensively about the implications of Michael Walzer's work in immigration and alienage law. *See, e.g.*, Bosniak, *Membership*, *supra* note 22. Bosniak analyzes the divergence between the treatment of undocumented immigrants within the realm of immigration law and the treatment of undocumented immigrants outside the realm of immigration law through the lens of complex equality. *See id.* at 1088-1137. She equates Walzer's "membership sphere" to the realm occupied by U.S. immigration law—rules about who may be admitted into the territory and on what conditions. *See id.* at 1090. Decisions made within this realm are "inside" the sphere of membership regulation, while decisions made in other realms are "outside" the sphere of membership regulation. *See id.* at 1059. Tracing key alienage law decisions, Bosniak argues that alienage law is characterized by a struggle to categorize an issue as one that properly falls inside or outside the sphere of membership regulation. *See id.* at 1047, 1090.

C. The Trouble with Territoriality: A Model without Modern Justification?

Complex equality gives a structural foundation for the separation of membership distribution at the border from membership distribution within the border, but it fails to provide a full explanation for territoriality. Even accepting Walzer's claim that the treatment of individuals within the territory is "entirely constrained" by moral concerns, what moral concerns require the distribution of full membership rights to everyone within the territory? Why elevate territorial presence above all other considerations? As I argue below, territoriality is merely a proxy, and a very inadequate one, for more fundamental indicators of membership and broader concerns about the character of the nation-state. Territoriality assumes that territorial presence leads to the conditions under which an individual should be considered a member. Three possible rationales underlie territoriality. First, distributing membership rights equally within the state territory preserves the character of the community by avoiding the creation of a caste of inhabitants with fewer rights than citizens. Second, because a state may impose obligations upon all individuals within its territory regardless of status, it must also afford corresponding protections to its subjects. Third, an individual's territorial presence within the state cultivates connections between the individual and the other individuals and entities within the state that should not be severed. While intuitively appealing, these rationales do not completely account for territoriality and ultimately expose some of the weaknesses in territoriality's modern application.

1. COMMUNITY PRESERVATION

One potential rationale for territoriality is the community preservation rationale.[43] Under this rationale, equality of membership is important, not because all individuals deserve membership rights equally, but because equality of membership preserves the nature of the community. This argument is not about fairness to strangers, but about preservation of a system, for example, egalitarianism is worth preserving because those who were already here desire to live in an egalitarian community and do not want to risk becoming a part of a

43. Others have called this the anti-caste or anti-subjugation principle. Bosniak, *Being Here*, *supra* note 6, at 392–95; *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1515 (2d ed. 1988). However, because the terms suggest a moral concern for the well-being of the "other," rather than the concern for the preservation of a certain type of society, I use an alternate label. *See also* WALZER, *supra* note 16, at 61–62 ("At stake here is the shape of the community . . . .").

future sub-class of members. Under this rationale, even an individual's consent to sub-standard treatment could not justify unequal treatment because the effect would be the same—the perpetuation of a second-class caste.[44] Thomas Jefferson's statement in opposition to the Alien Friends Act, Alien Enemies Act, and Sedition Act in 1798 embraces this notion: "[T]he friendless alien has indeed been selected as the safest subject of a first experiment; but the citizen will soon follow . . . ."[45]

Self-preservation explains, at least in part, various scholars' and courts' espousal of territoriality.[46] Owen Fiss, for example, has argued that the principle of self-preservation is implicit in the Fourteenth Amendment as "a statement about how society wishes to organize itself, and prohibits subjugation, even voluntary subjugation, because such a practice would disfigure society."[47] Indeed, "[w]e ought not to subjugate immigrants, not because we owe them anything, but to preserve our society as a community of equals."[48]

2. MUTUALITY OF OBLIGATION

A second possible rationale for territoriality is the mutuality of obligation rationale: the state owes individuals within the territory membership rights because those individuals are subject to the obligations imposed by the state.[49] Under this rationale, territorial presence evidences the individual's acceptance of the state's jurisdiction over her.[50]

This concept of reciprocal obligations flows from Westphalian notions of territorial sovereignty in which the nation-state is a unitary, self-contained actor with complete and exclusive jurisdiction over the people within its territory.[51] Likewise, no state has power to act within

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44. *See* Bosniak, *Being Here*, *supra* note 6, at 392–95.

45. THOMAS JEFFERSON, *Drafts of the Kentucky Resolutions of 1798*, *in* 7 THE WRITINGS OF THOMAS JEFFERSON, 1795–1801, at 289, 303 (Paul Leicester Ford ed., 1896).

46. *See, e.g.*, Bosniak, *Being Here*, *supra* note 6, at 407 ("[I]f we do not extend rights and recognition to co-inhabitants, . . . we will, to that extent, poison the democratic community at its heart."); Fiss, *supra* note 28, at 6.

47. Fiss, *supra* note 28, at 6.

48. *Id.*

49. *See* NEUMAN, *supra* note 4, at 107–08 (describing territoriality as based on mutuality of obligation).

50. *See id.*

51. Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2508–11 (2005) (tracing territoriality back to the Peace of Westphalia). This view of sovereignty was a significant departure from the pre-Westphalian vassal system of rule in which complex networks of feudal allegiance and political rule overlapped without

the borders of another nation-state.[52] Thus, in a Westphalian world, a nation-state may only impose obligations on and protect the population within its territorial borders. It follows that *where* an individual resides, rather than *who* the individual is, determines *which rules* apply.[53] That is, presence within the nation-state's territory determines an individual's obligations. The nation-state, in turn, affords those individuals whatever membership rights and benefits it has undertaken to provide residents.[54]

The mutuality of obligation rationale for territoriality makes perfect sense in a purely Westphalian system. The reality, however, is that states often do impose obligations outside their borders and selectively suspend obligations within their own territory.[55] Embassies, for example, function as islands of immunity from the obligations imposed by the host state within its territory even though embassies operate within the host state's territory.[56] States have also historically

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regard to geographic boundaries. *See* Stèphane Beaulac, *The Westphalian Model in Defining International Law: Challenging the Myth*, 8 AUSTL. J. LEGAL HIST. 181, 181–86 (2004), *available at* http://www.austlii.edu.au/au/journals/AJLH/2004/9.html; Leo Gross, *The Peace of Westphalia, 1649–1948*, 42 AM. J. INT'L L. 20, 34 (1948). Then, it was membership in a vassal network that mattered, and membership was established through professed allegiance to a vassal lord, which both secured land and protection and imposed obligations. *See* Beaulac, *supra*, at 189. However, allegiance to one vassal lord did not preclude allegiance to another; thus, "[f]eudal lines of obligation resembled a system of arteries in a body, not a pyramid with an apex." DANIEL PHILPOTT, REVOLUTIONS IN SOVEREIGNTY: HOW IDEAS SHAPED MODERN INTERNATIONAL RELATIONS 79 (2001).

52. *See* M.S. Janis, *Sovereignty and International Law: Hobbes and Grotius*, *in* ESSAYS IN HONOUR OF WANG TIEYA 391, 393 (Ronald St. John Macdonald ed., 1994).

53. Raustiala, *supra* note 51, at 2514–15.

54. The principle of mutuality of obligation closely relates to the concept of government with limited powers. A government of limited power only has the power to act in a certain way, subject to significant restraints that are in place to protect individual liberties. In a sense, this institutionalizes the notion of mutual obligations: the government can only obligate its residents when acting under the restraints of corresponding individual protections. Any other course of action is legally impossible because the government simply does not have the power to do anything else. *See* Bosniak, *Being Here*, *supra* note 6, at 408 ("To the extent that a state exercises power in a territorial space . . . every person present within that space and 'subject to the jurisdiction' of that power, should be armed with individual protections against its exercise.").

55. STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 25 (1999); *see also* Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1201–06 (1996).

56. Raustiala, *supra* note 51, at 2510 (also offering the principle of sanctuary, areas that were "plainly within a prince's territorial realm yet into which secular law could not reach," as an example of lapses in territorial sovereignty).

had extraterritorial jurisdiction over certain crimes[57] and routinely pass laws to govern their nationals abroad.[58] This incongruous relationship between modern notions of jurisdiction has led some to call for the rejection of territoriality, at least as far as it limits protections for individuals outside of U.S. borders, and the adoption of a model based entirely on mutuality of obligation.[59]

3. COMMUNITY TIES

Joseph Carens, along with others, has defended territoriality based on a community ties rationale:

> Whatever their legal status, individuals who live in a society over an extended period of time become members of that society, as their lives intertwine with the lives of others there. These human bonds provide the basic contours of the rights that a state must guarantee; they cannot be regarded as a matter of political discretion.[60]

Under this view of territoriality, territorial presence serves as an indicator of an individual's ties to other individuals and entities within the territorial boundaries of the state. This view of territoriality is attractive in its recognition of real human relationships as a basic social fabric, but the question remains: what is it about the existence of human relationships that requires the bestowal of membership rights?

One possibility is that an individual's ties to the surrounding community foster commitment and loyalty to those around her. As an individual becomes dependent on her surrounding community, her

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57. Universal jurisdiction over piracy, which has a long history in international law, is illustrative. Since the first part of the seventeenth century, international norms allow any state that captures a pirate on the high seas (outside the state's territory) to try and punish the pirate, regardless of the pirate's nationality, the location of the crime being punished, or the location of the pirate's capture. *See* Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 190 (2004) (challenging the argument that universal jurisdictions over heinous crimes and violations of human rights is analogous to universal jurisdiction over piracy).

58. For example, the U.S. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (2006), penalizes U.S. business entities for the bribery of foreign officials to obtain a business advantage, despite the fact that this often occurs outside of U.S. territory.

59. Raustiala, *supra* note 51, at 2504 (advocating the adoption of a "rebuttable presumption that when legal power is brought to bear, so too are legal protections").

60. Carens, *supra* note 28, at 16; *see also* Bosniak, *Being Here*, *supra* note 6, at 404. *See generally* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (2006) (suggesting a membership model based on "affiliations").

personal interests align with those of the community. The individual is therefore more likely to make valuable contributions to the community and refrain from harming it in order to augment her own existence within the community. Affording membership rights to such an individual rewards her contribution.

A second possibility is that as strangers develop ties to the surrounding community, they begin to help define its character. In other words, not only do the individual's ties to the community merit the individual's inclusion as a member, but the *community's ties to the individual* require inclusion of that individual. By including such an individual, the state preserves the community's character, which is a function of its members' social affiliations. This argument is merely a restatement of what I have termed the "community preservation rationale." That is, those who are members owe individuals who have formed ties to the community nothing. Rather, they owe it to the community—to themselves—to preserve those ties and the community built on those ties.[61]

A third reason community ties may require the distribution of membership rights equally within territorial boundaries derives from a social contract theory of government.[62] The very existence of the state, under this view, is a result of individuals needing to collectively meet obligations to each other.[63] These obligations arise from relationships among individuals—from social connections, which generate reciprocal obligations between individuals.[64] Thus, when a stranger forms social ties with individuals who are "members" of the state, those members

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61. Although Walzer does not systematically discuss the rationales for territoriality, he suggests that a community's ties to an individual are important indicators of membership. First, Walzer specifically mentions "actual contacts, connections, alliances we have established" with strangers as factors weighing in favor of formal membership in the state. WALZER, *supra* note 16, at 32. Walzer points to U.S. immigration policy, which favors a certain type of social connection—family relationships—by providing a means for preexisting members to bring those with whom they have social ties to live within the same community. *Id.* at 41 (referring to this as the "kinship principle"). Second, Walzer stresses the importance of the community's ties to and dependence on the individual, rather than the individual's ties to the community, in his discussion about the treatment of individuals within the territory. *See id.* at 31–35. He challenges the concept of guest worker programs, in which immigrants are admitted into the territory but denied certain rights: "[G]uest workers are not 'guests' . . . . They are workers, above all . . . . They do socially necessary work, and they are deeply enmeshed in the legal system of the country to which they have come." *Id.* at 59–60.

62. *See* Iris Marion Young, *Responsibility and Global Justice: A Social Connection Model*, 23 SOC. PHIL. & POL'Y 102, 105 (2006).

63. *See id.* at 106.

64. *See id.* at 104–05.

take on obligations to those strangers.[65] The members then discharge their obligations to the stranger through the state.[66] In that sense, an individual's ties to the community are, in effect, ties to the state, which, in turn, generate obligations and expectations between the state and the stranger.[67] Under this view, the community ties rationale for territoriality is nothing more than a restatement of the reciprocal obligation rationale, discussed above. Community ties simply serve to help explain the origin of reciprocal obligations.

Despite the appeal of the community ties rationale, it does not hold up well in practice. First, in today's world, ties (and any resulting obligations) to other individuals and entities do not necessarily depend on physical proximity.[68] In fact, as the popularity of Internet-based social networking sites suggests, individuals may easily maintain affiliations with individuals in other countries. It is also entirely possible for an individual to have very few affiliations with those inside the country in which he or she resides. Moreover, even where an individual does have ties to others within the same nation-state, these affiliations may stem from shared interest, familial ties, professional obligations, etc., rather than from physical proximity. In a large country like the United States, people may very well happen to live in the same country, but they may live hundreds of miles apart.

Second, territoriality's binary conception of members and nonmembers does not coincide with this affiliation-focused rationale. The types, depth, and number of community ties vary by individual. Community ties distribute across a spectrum, not a on a binary toggle. Is there a threshold number and type of connections required of a "member"? If community ties underlie territoriality, should an individual with more connection to the surrounding community have a greater claim on membership rights than one whose only connection to the surrounding community is mere presence in it?

II. TERRITORIALITY'S METAMORPHOSIS OUTSIDE THE EMPLOYMENT SPHERE

Perhaps because of the weaknesses in territoriality's theoretical underpinnings, exposed by an increasingly globalized world,

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65. *See id.* at 106.

66. *Id.* at 123.

67. *See id.* at 116, 123.

68. For a discussion of "place" and its overstated relationship with identity and responsibility, see Doreen Massey, *Geographies of Responsibility*, 86B GEOGRAFISKA ANNALER 5 (2004), *available at* http://oro.open.ac.uk/7224/1/Geographies_of_responsibility_Sept03.pdf.

territoriality's role in U.S. law has begun to wane. However, the status-based model has not replaced territoriality. Instead, territoriality is undergoing a transformation: it is shedding its preoccupation with geography and instead turning to more fundamental indicators of membership. This transformation is evident in the historical progression of alienage law and notions of extraterritorial jurisdiction.[69] While early courts adopted territoriality's broad inclusivity within the border to eliminate many distinctions between aliens and citizens living in the United States, recent courts have suggested that territorial presence alone is not enough. Outside the border, territoriality's exclusionary force has also declined—in some circumstances, the law follows the flag across geographic borders.

In this Part, I explore territoriality's role in U.S. law. I track the United States' early adoption and adherence to strict territoriality, as well as the subsequent decline and partial abandonment of territoriality. I argue that the trend away from strict territoriality is not an acceptance of the status-based model, but an effort to distribute membership based on more fundamental indicators of membership—indicators that once correlated with territorial presence but no longer do. The more flexible territoriality seen in recent cases signals courts' recognition that territoriality, applied strictly in modern circumstances, actually undermines its underlying rationales.[70] Courts are now asking more principled questions about membership, questions that territoriality is no longer capable of answering.[71] Using courts' reasons for, in the beginning, adhering to territoriality and, later, rejecting or altering

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69. Commentators often treat territoriality's inclusion of individuals within the border and its exclusion of individuals outside the borders as two separate bodies of law. Territoriality's inclusionary properties take center stage in discussions of citizenship and alienage law. *See, e.g.*, Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CAL. L. REV. 1879, 1888-89 (2007); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 554 (1990). Territoriality's exclusionary side, on the other hand, plays a role in analyses of the extraterritorial reach of U.S. constitutional protections. *See, e.g.*, Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973, 974-78 (2009); Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1361-62 (2007). However, territoriality's exclusionary and inclusionary attributes are merely opposite sides of the same coin—inclusion within the border means something only because of exclusion outside the border. Although my ultimate focus in this Article is on alienage law—the treatment of aliens *inside* the United States—it is useful to talk about territoriality in its entirety because the rationales for denying membership rights to someone outside the border are the same as the rationales for bestowing membership rights to those within the border.

70. *See infra* Part II.B.

71. *See infra* Parts II.B-C.

territoriality, I suggest that a new post-territorial approach to membership based on the rationales that originally drove territoriality is emerging. Later, in Part III, I will argue that this post-territorial model should apply in the employment sphere as well, despite the status-based model's encroachment into that sphere.

A. Territoriality in Early U.S. Law

Early U.S. case law displayed a rigid adherence to territoriality, at first without any explicit rationale for doing so. However, subsequent opinions espoused territoriality on the basis of the rationales discussed in Part I. Courts strove to conserve the character of the U.S. community as a whole, preserve community ties, and reciprocate immigrants' obligation to be governed under U.S. law. Territoriality, it turned out, fairly effectively accomplished those goals and therefore governed the distribution of membership rights within the United States, as well as outside.

1. INSIDE THE BORDER

Both the exclusionary and inclusionary sides of territoriality have a long tradition in U.S. law.[72] Within the United States, territorial

72. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202 (1982) (prohibiting a state from denying undocumented children within the U.S. the right to public education because they are within the territory); *Wong Wing v. United States*, 163 U.S. 228, 234–35 (1896) (holding that Fifth and Sixth Amendments apply to all within U.S. territory); *In re Ross*, 140 U.S. 453 (1891) (denying right to trial by jury on the basis that the claimant was outside of U.S. territory); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that the Equal Protection clause of the Fourteenth Amendment applies to aliens within U.S. territory). Of course, translating this model into a practical mechanism for sorting members from nonmembers has required significant interpretation and development of concepts. First, and most obviously, there is room for debate about where U.S. boundaries are located and what constitutes U.S. territory. (This was arguably the crux of the dispute over the detention cases of *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), and *Hamdan v. Rumsfield*, 548 U.S. 557 (2006).) Second, courts have limited the scope of territorial presence through a series of legal fictions that may render a person "not here" for purposes of the law even though the person is physically present in the U.S. *See, e.g.*, *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 213 (1953). On this principle, the Supreme Court held that an alien denied admission to the United States and held indefinitely at Ellis Island had no right to a hearing, as otherwise would be guaranteed by due process, because "harborage at Ellis Island is not an entry into the United States." *Id.* Although this legal fiction served to fit the detention into the mold of territoriality, it hardly comported with the rationales of territoriality, especially the community ties rationale: The petitioner had been a twenty-five-year resident of the United States prior to leaving its shores for an extended trip to then-communist Eastern Europe to visit his mother. *Id.* at 208–09. He was held for twenty-

presence, rather than status, has historically secured basic constitutional protections for immigrants.[73] Early Supreme Court precedent, beginning with *Yick Wo v. Hopkins*[74] in 1886, explicitly adopted strict territoriality as the governing model in alienage law decisions.[75] In *Yick Wo*, the Supreme Court struck down a San Francisco laundry licensing ordinance that was disproportionately enforced against Chinese laundry operators.[76] The Court found that the ordinances' ultimate effect, if not purpose, of "driv[ing] out of business all the numerous small laundries, especially those owned by Chinese, and giv[ing] a monopoly of the business to the large institutions established . . . by means of large associated Caucasian capital" was impermissible.[77] The petitioners, two Chinese nationals who ran laundry businesses in San Francisco, were entitled to the protections of the Fourteenth Amendment by virtue of being in the United States, despite the then-current prohibition on the immigration of Chinese laborers:[78] "These provisions [of the Fourteenth Amendment] are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality. . . ."[79] Although the Court gave no explanation for its rigid adherence to territoriality, *Yick Wo*'s inclusiveness, as well as the Court's separation of border-related matters from internal matters, became entrenched in U.S. alienage law, as evidenced by subsequent Supreme Court cases.[80]

Nine years after *Yick Wo*, the Supreme Court arguably took a territorial view of the Fifth and Sixth Amendments in *Wong Wing v.*

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one months before being allowed to rejoin his wife at his home in Buffalo, New York. *Id.*

73. David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 978 (2002) ("[R]elatively little turns on citizenship status. The right to vote and the right to run for federal elective office are restricted to citizens, but all of the other rights are written without such limitation.").

74. 118 U.S. 356 (1886).

75. *Id.* at 369.

76. *Id.* at 374.

77. *Id.* at 362.

78. *Id.* at 358, 374. Under the Chinese Exclusion Act of 1882, Congress suspended immigration of Chinese laborers for ten years. Gabriel Chin et al., *The Origins of Plenary Power*, *in* IMMIGRATION STORIES 7, 8 (David A. Martin & Peter H. Schuck eds., 2005). Under the Act, Chinese immigration dropped from 39,000 immigrants in 1882 to ten immigrants in 1887. *Id.* While the U.S. population more than doubled between 1880 and 1920, the Chinese-U.S. population dropped by over a third. *Id.* at 8.

79. *Yick Wo*, 118 U.S. at 369.

80. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that Equal Protection requires states to provide public education to undocumented children); *Wong Wing v. United States*, 163 U.S. 228 (1896) (using reasoning in *Yick Wo* to extend Fifth and Sixth Amendment rights to aliens within U.S. territory).

United States.[81] There, the Court rejected the government's proposition that it could sentence aliens who had violated immigration laws to hard labor without first holding a jury trial.[82] The Court relied on *Yick Wo*:

> Applying [*Yick Wo*'s] reasoning to the fifth and sixth amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be . . . deprived of life, liberty, or property without due process of law.[83]

The Court again failed to explain its rationale for employing territoriality, but, as in *Yick Wo*, the Court separated the distribution of rights at the border from the distribution of rights within the border. Even though the petitioner had violated immigration laws—border rules—and was subject to deportation, his imprisonment was not itself border control but a matter of criminal punishment, a sphere subject to constitutional restraints.[84]

In later cases, and perhaps due to increasing doubts about the logic of affording rights to those without authorization to be here,[85] courts began to explain their adherence to territoriality. The Supreme Court's opinion in *Plyler v. Doe*[86] reaffirmed territoriality's role in U.S. alienage law and offered a defense of territoriality.[87] *Doe* involved a Texas statute that prohibited the use of state funds for the education of unauthorized immigrant children and allowed local public schools to deny enrollment to such children.[88] The Court struck down the statute, holding that the Fourteenth Amendment "reaches into every corner of a State's territory" to protect everyone within the state, citizen and alien alike.[89] Status, the Court held, was irrelevant: "That a person's initial entry into a State, or into the United States, was unlawful, and that he

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81. *Wong Wing*, 163 U.S. at 234–35.

82. *Id.* at 237.

83. *Id.* at 238.

84. *See* Bosniak, *Membership*, *supra* note 22, at 1096–98 (using *Wong Wing* to illustrate the applicability of Michael Walzer's principle of complex equality and sphere separation in U.S. law).

85. *See, e.g.*, Denny Chin, *Aliens' Right to Work: State and Federal Discrimination*, 2 IMMIGR. & NAT'LITY L. REV. 447 (1979) (discussing discriminatory labor laws in regards to immigrants); *Panel Finds Flaws in Immigration Law*, N.Y. TIMES, Sept. 14, 1980, at 27 (discussing the Fourth Amendment rights granted in immigration hearings).

86. 457 U.S. 202 (1982).

87. *Id.* at 213–15.

88. *Id.* at 205.

89. *Id.* at 210–11, 215.

may for that reason be expelled, cannot negate the simple fact of his presence within the State's territorial perimeter."[90]

The Court accounted for this "territorial theme"[91] in U.S. alienage law with reference to two of the rationales introduced in Part I above. First, the Court offered mutuality of obligation as a rationale for territoriality.[92] According to the Court, the Fourteenth Amendment applies to "all upon whom the State would impose the obligations of its laws," that is, everyone within the territorial jurisdiction of the state:[93] "[T]he obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction."[94] Briefly put, the state could not impose obligations on its residents without also providing benefits—the state and its residents were mutually obligated to one another by virtue of the state's jurisdiction over its territory and the individual's presence within that territory.

Second, the Court emphasized territoriality's ability to preserve the national community's character.[95] Under this rationale, offering unauthorized immigrant children a public education is necessary, not as a matter of fairness to individual immigrants, but because education "has a fundamental role in maintaining the fabric of our society."[96] According to the Court, we must afford unauthorized immigrants a public education in order to preserve "a democratic system of government,"[97] ensure that individuals will be able to "lead economically productive lives to the benefit of us all,"[98] and "sustain[] our political and cultural heritage . . . ."[99] The existence of an underclass of immigrants, systematically deprived of rights, would seriously undermine "a Nation that prides itself on adherence to principles of equality under law."[100]

Yick Wo and its progeny took a strong hold in American alienage law. Under what has been referred to as the "*Yick Wo* tradition" of

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90. *Id.* at 215.
91. *Id.* at 212.
92. *Id.* at 214.
93. *Id.* (examining the congressional debate surrounding the Fourteenth Amendment).
94. *Id.* at 213.
95. *Id.* at 221.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 219.

territoriality,[101] aliens have enjoyed and continue to enjoy a large array of rights and benefits, including the right to enter into and enforce contracts, buy and sell property, marry, and sue in tort.[102] Immigrants, regardless of status, have essentially been deemed "members" for matters on the "in" side of the border.

2. OUTSIDE THE BORDER

Territoriality's exclusionary side—its denial of membership rights to those outside of the territory's geographic boundaries—has also played a significant role in U.S. law. *In re Ross*,[103] an early example of territoriality's exclusionary attributes, governed the application of U.S. constitutional law abroad for several decades.[104] In *Ross*, a U.S. consular court had found a sailor employed on a U.S. merchant ship[105] guilty of murder.[106] Ross challenged his conviction on Sixth Amendment grounds, claiming his right to a trial by jury had been violated.[107] The Court denied that Ross had a right to a trial by jury at all and held that the consular court could not have violated the U.S. Constitution because "[t]he Constitution can have no operation in another country."[108] The Court, in effect, defended the territorially based denial of constitutional rights based on the absence of mutual obligations between the petitioner and the U.S. government.[109] The

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101. *See* Bosniak, *Membership*, *supra* note 22, at 1060 & n.39 (cataloguing the widespread association of *Yick Wo* with broader alienage law).

102. 42 U.S.C. § 1981(a) (2006) ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."); *see also Buck v. Stankovic*, No. 3:07-CV-0717, 2008 WL 4072656, at *1, 6, 20 (M.D. Pa. Aug. 27, 2008) (granting attorneys' fees to an undocumented immigrant that had been refused a marriage license where an injunction ordering granting of the license had previously been ordered); *King v. ZirMed, Inc.*, No. 3:05CV-181-H, 2007 WL 3306100, at *5 (W.D. Ky. Nov. 6, 2007) (holding that denying undocumented workers the right to contract flies in the face of 42 U.S.C. 1981); *Shen v. A & P Food Stores*, No. 93 CV 1184 (FB), 1995 WL 728416, at *1-3 (E.D.N.Y. Nov. 21, 1995) (holding that refusing to sell groceries to an immigrant is a denial of the right to contract).

103. 140 U.S. 453 (1891).

104. Raustiala, *supra* note 51, at 2517.

105. The Court treated the sailor as a constructive U.S. citizen but indicated that the outcome would have remained the same whether he were a citizen or not. *In re Ross*, 140 U.S. at 478–79.

106. *Id.* at 454.

107. *Id.* at 458–59.

108. *Id.* at 464.

109. *Id.* at 464–65.

Court suggested that the United States had no sovereign authority to apply its laws—either to impose an obligation or offer protection—to individuals outside its territory.[110] Rather, the United States' authority to hold consular adjudication of crimes abroad, the Court explained, is entirely a product of an agreement made with the host country in an effort to *reduce the burden of the obligations* that the host country would otherwise have imposed upon the individual.[111] The Court further stated that

> [w]hile, therefore, in one aspect the American accused of crime committed in those countries is deprived of the guaranties of the constitution against unjust accusation and a partial trial, yet in another aspect he is the gainer, in being withdrawn from the procedure of their tribunals, often arbitrary and oppressive, and sometimes accompanied with extreme cruelty and torture.[112]

Ross's strict territorial approach to the question of whether the Constitution follows the flag persisted into the middle of the last century and gave rise to heated debates about what, exactly, constituted U.S. territory. Was it any territory under U.S. military power? Was it only incorporated states? In the *Insular Cases*,[113] which involved the applicability of the Constitution to then-recent U.S. acquisitions such as the Philippines and Puerto Rico, the Supreme Court formulated the rule that the Constitution applied in full in incorporated territories destined for statehood.[114] Yet for almost a century of U.S. history, the Constitution did not follow the flag outside of U.S. territory.[115]

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110. *Id.* at 464 ("When, therefore, the representatives or officers of our government are permitted to exercise authority of *any kind* in another country, it must be on such conditions as the two countries may agree; *the laws of neither one being obligatory upon the other.*") (emphasis added).

111. *Id.* at 464–65.

112. *Id.* at 465.

113. *See, e.g.*, *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903), *limited by Reid v. Covert*, 354 U.S. 1 (1957); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901). *But see, e.g.*, *Reid v. Covert*, 354 U.S. 1, 14 (1957) ("The 'Insular Cases' can be distinguished from the present cases in that they involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions whereas here the basis for governmental power is American citizenship.").

114. *See Dorr*, 195 U.S. at 143.

115. *Pugh v. United States*, 212 F.2d 761, 764 (9th Cir. 1954).

B. Territoriality in Recent U.S. History: The Beginning of the End?

Notwithstanding its long tenure in U.S. law, strict territoriality, in both its inclusionary and exclusionary forms, has begun to weaken.[116] Within the U.S., territoriality's dominance is faltering. Rights and benefits that once hinged on territorial presence now require something more, although exactly *what* more remains unclear. Abroad, territoriality has given way to a more flexible membership model under which citizens and some aliens abroad are entitled to constitutional protections. Notably, though, even as courts rely less and less on geography as a basis for the distribution of membership rights, the new, more flexible approach to the distribution of membership rights furthers the very same rationales offered by earlier courts in defense of territoriality. As it turns out, courts have not abandoned a commitment to valuing de facto membership, it is territoriality that seems to be failing as a reliable indicator of de facto membership. Community ties, mutuality of obligation, and community preservation now play an increasingly direct role in the distribution of membership rights. They are now more than underlying rationales: these principles form the very structure of an emerging post-territorial membership model.

None of this is to say that there is no cause for concern over the rejection of territoriality in alienage law.[117] Territoriality has served to secure undocumented immigrants access to fundamental rights and protections—a cause with which I sympathize. Certainly, territoriality offers predictability and consistency that cannot be matched by a more flexible, even principled, approach. Without the clear dictates of territoriality, it is easy to wander from territoriality's appealing inclusivity into a status-based approach that ignores the realities of immigrants' lives. However, defending territoriality in today's interconnected world is difficult, and courts have had to adjust for these changes in questions of law both inside and outside the border.

1. INSIDE THE BORDER

Some of the first hints of territoriality's waning applicability within U.S. territory appeared in the Supreme Court's opinion in *United States*

116. *See* Raustiala, *supra* note 51, at 2513-28 (tracking the dominance of territoriality in U.S. law and advocating the abandonment of strict territoriality to bar the constitutional claims of aliens abroad).

117. For articles supporting territoriality, see Bosniak, *Being Here*, *supra* note 6, at 389; Cristina M. Rodríguez, *The Citizenship Paradox in a Transnational Age*, 106 MICH. L. REV. 1111, 1127 (2008) (reviewing HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (2006)).

v. Verdugo-Urquidez.[118] There, a plurality of Court suggested that territorial presence may not be enough for some membership rights to attach.[119] The case addresses principally Fourth Amendment rights[120] and re-characterized *Yick Wo* and its progeny: "These cases . . . establish only that aliens receive constitutional protections when they have come within the territory of the United States and *developed substantial connections with this country*."[121] The defendant, a Mexican national who had been brought to the United States against his will while U.S. law enforcement agents searched his house in Mexico without a warrant,[122] had not established such connections:

> [T]his sort of presence—lawful but involuntary—is not of the sort to indicate any substantial connection with our country . . . . We do not think the applicability of the Fourth Amendment to the search of premises in Mexico should turn on the fortuitous circumstance of whether the custodian of its nonresident alien owner had or had not transported him to the United States at the time the search was made.[123]

Despite its disenchantment with territoriality, the plurality ultimately conformed to a territorial approach: it was the location of the defendant's home outside of U.S. territory on which the plurality rested the denial of Fourth Amendment rights.[124] However, the plurality's explicit effort to recast prior territorially based decisions as espousing a

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118. 494 U.S. 259 (1990). In *Verdugo-Urquidez*, Justices Kennedy, White, O'Connor, and Scalia joined Justice Rehnquist's opinion. *See id.* at 261. However, because Justice Kennedy's concurrence diverged substantially from the reasoning of the Court, even rejecting the Court's fundamental line of reasoning, commentators and courts have referred to the Court's opinion as a plurality opinion. *See, e.g.*, *Lamont v. Woods*, 948 F.2d 825, 835 & n.7 (2d Cir. 1991) (explaining that a "plurality of the Court" subscribed to Justice Rehnquist's definition of "the people"); Randall K. Miller, *The Limits of U.S. International Law Enforcement After* Verdugo-Urquidez*: Resurrecting* Rochin, 58 U. PITT. L. REV. 867, 867 n.3 (1997); Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 972 (1991) ("Rehnquist seemed to really be speaking for a plurality of four."); Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 681 (2003) ("Somewhat bafflingly, Justice Kennedy disagreed with Chief Justice Rehnquist's analysis but nonetheless joined the majority opinion in full, providing the fifth vote for the Court's opinion.").

119. *Verdugo-Urquidez*, 494 U.S. at 274–75.

120. The Court first held that because the search at issue occurred outside the United States, the Fourth Amendment did not apply. *Id.* at 264–66. However, in response to the petitioner's argument that his presence within U.S. borders triggered Fourth Amendment rights, the Court then considered the issue. *Id.* at 274–75.

121. *Id.* at 271 (emphasis added).

122. *Id.* at 262.

123. *Id.* at 271–72.

124. *Id.* at 274–75.

more nuanced approach to membership indicates a shift away from strict territoriality.

While *Verdugo-Urquidez* poses a significant threat to long-standing expectations of equal constitutional protection for aliens within U.S. borders, *Verdugo-Urquidez* does not, by its terms, extinguish immigrants' claims to protection. Rather, it acknowledges that territorial presence is a poor measure of community ties and connections. With *Verdugo-Urquidez*, the Court suggests that territoriality is an unnecessary intermediary. While it may have served as a valuable shortcut in membership analysis in the past, it no longer accurately represents the community ties that are essential to de facto membership.[125]

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125. Unfortunately, a series of subsequent Fourth Amendment cases involving previously deported undocumented immigrants highlights the potential for the status-based approach to encroach into Fourth Amendment analysis under the guise of recognizing community ties. The court in *United States v. Esparza-Mendoza*, 265 F. Supp. 2d 1254 (D. Utah 2003), *aff'd on other grounds*, 386 F.3d 953 (10th Cir. 2004), in an opinion that expressly treated the issue as one of membership, based its denial of Fourth Amendment rights to a previously deported felonious alien on *Verdugo-Urquidez*'s "substantial connection" test. *Id.* at 1260–61. The court found Esparza-Menodoza's connections to the United States, consisting of an illegal entry followed by a felony conviction, deportation, and a second illegal entry, to be insufficient for Fourth Amendment rights to attach: "[P]reviously deported alien felons," it held, "are not covered by the Fourth Amendment." *Id.* at 1271. In doing so, the court explicitly rejected territoriality as the governing model for distribution of Fourth Amendment rights: "[Esparza-Mendoza] has managed to illegally enter Utah and, by virtue of that fact alone, he is entitled to those rights which follow from mere presence in this country. But he lacks entitlement to those rights which come from being a member of American society—including Fourth Amendment rights." *Id.* at 1271. Interestingly, the court did not reconcile its acknowledgement that some constitutional rights are activated by mere presence within the United States with *Verdugo-Urquidez*'s suggestion that all constitutional rights require such connections.

Although *Esparza-Mendoza* was affirmed on other grounds, 386 F.3d 953 (10th Cir. 2004), its reasoning has found favor with several courts, and one court has held that an undocumented immigrant can never satisfy *Verdugo-Urquidez*'s substantial connections test. *See, e.g.*, *United States v. Gutierrez-Casada*, 553 F. Supp. 2d 1259, 1272 (D. Kan. 2008) (denying Fourth Amendment rights to a "previously deported, aggravated felonious illegal alien who chose to reenter the United States knowing that the sovereign country, by due process of law, had recently ordered him to leave and stay out of the country"); *United States v. Atienzo*, No. 2:04-CR-00534, 2005 WL 3334785, at *5–6 (D. Utah Dec. 7, 2005) (agreeing with *Esparza-Mendoza*'s categorical exclusion of previously deported felons but holding that a non-felon deportee may have sufficient connections for protection under the Fourth Amendment); *United States v. Ullah*, No. 04-CR-30A(F), 2005 WL 629487, *29-30 (W.D.N.Y. Mar. 17, 2005); *see also Martinez-Aguero v. Gonzalez*, No. EP-03-CA-411(KC), 2005 WL 388589 (W.D. Tex. Feb. 2, 2005), *aff'd on other grounds*, 459 F.3d 618 (5th Cir. 2006) (suggesting that unlawful entry into the country forecloses access to Fourth Amendment rights but ultimately finding that a woman who had relied on a consular official's assurance that she could legally enter the country with an expired border

2. OUTSIDE THE BORDER

Territoriality's decline has not been limited to the treatment of aliens *within* U.S. territory. *Reid v. Covert*[126] signaled a shift in the Supreme Court's approach to the distribution of membership rights *outside* U.S. borders that has diluted territoriality's exclusionary attributes. In *Reid*, the Court held that two U.S. citizens living abroad and convicted by a U.S. military court for the murder of their husbands were protected by the Bill of Rights and enjoyed the right to a trial by jury after indictment by a grand jury.[127] The Court viewed the issue through a status-based lens, emphasizing the petitioners' status as U.S. citizens:

> At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. . . . When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.[128]

The Court thereby rejected the strictly territorial notion espoused in *Ross* and the *Insular Cases* that the Constitution was inapplicable abroad.[129]

While *Reid*'s introduction of the status-based model into the distribution of membership rights outside of U.S. territory expanded the reach of Constitutional rights for citizens, it made no change in the non-

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crossing card because a replacement card had been issued but was in the mail was entitled to Fourth Amendment protection).

Esparza-Mendoza and its progeny demonstrate the potential for the status-based model to fill in any gaps left by the departure of territoriality. In those cases, the courts arguably based their decisions on the defendant's status, not on their actual contacts with the surrounding community. In fact, in each of those cases the court had little information regarding the defendant's affiliations or connection with the United States. Instead, the courts foreclosed the possibility of substantial connections on account of unauthorized status (as augmented by a previous deportation). However, these cases, I would argue, are merely misapplications of an emerging concept of membership that considers actual community ties in the distribution of membership rights, rather than mere territorial presence. *See Esparza-Mendoza*, 265 F. Supp. 2d at 1273, *aff'd on other grounds*, 386 F.3d 953. The court, however, specifically declined to determine whether an unauthorized immigrant that had never been deported would also lack a sufficient connection to the U.S. to assert Fourth Amendment rights. *Id.*

126. 354 U.S. 1 (1957).

127. *Id.* at 32–33.

128. *Id.* at 5–6.

129. *Id.* at 12.

citizen's rights. Without sufficient legal status and without presence within U.S. borders, the noncitizen stood outside the reach of Constitutional protections.[130] More recently, though, the Supreme Court's opinion in *Boumediene v. Bush*[131] suggested that aliens, too, may enjoy some Constitutional protection outside of U.S. borders.[132]

In *Boumediene*, the Court essentially faced a question of membership—of which membership model to apply to determine whether enemy combatant detainees held at Guantanamo Bay were "members" for purposes of enjoying a right to the writ of habeas and the protections of the Suspension Clause.[133] In its lengthy opinion, the Court struggled to define the contours of membership, acknowledging that formal status and territorial presence within the U.S. were traditional indicators of membership:

> In deciding the constitutional questions now presented we must determine whether petitioners are barred from seeking the writ or invoking the protections of the Suspension Clause either because of their status, i.e., petitioners' designation by the Executive Branch as enemy combatants, or their physical location, i.e., their presence at Guantanamo Bay.[134]

Despite the detainees' lack of status and territorial presence, the Court held that Congress could not deny them the privilege of habeas corpus without complying with the Suspension Clause.[135] In rejecting a strict territorial approach, the Court noted that some of the "prudential considerations" relevant to the early British practice of withholding the writ from individuals outside of England no longer apply.[136] While British courts arguably faced the prospect of being unable to enforce a writ issued to an individual outside of England—specifically in Scotland or Hanover—because of distance or conflicting local judgments, the U.S., according to the Court, did not face the possibility that it would be unable to enforce writs issued to detainees in Guantanamo.[137] Rather,

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130. *See Johnson v. Eisentrager*, 339 U.S. 763, 770–71 (1950) (explaining that *Yick Wo* and its progeny conferred rights only to aliens within the U.S. territory; outside of the U.S., aliens are at best strangers and at worst enemy combatants).

131. 128 S. Ct. 2229 (2008).

132. *Id.* at 2262.

133. *Id.*

134. *Id.* at 2244.

135. *Id.* at 2262.

136. *Id.* at 2250.

137. *Id.* at 2251 ("The modern-day relations between the United States and Guantanamo thus differ in important respects from the 18th-century relations between England and the kingdoms of Scotland and Hanover.").

"no law other than the laws of the United States applies at the naval station,"[138] even though Cuba retains technical sovereignty over Guantanamo.[139]

In effect, the Court highlighted territoriality's failure to preserve the notion of reciprocal or mutual obligations. The Court's argument can, in part, be read as a critique of Westphalian notions of territoriality: since governments can and do impose obligations abroad, they also can and ought to afford corresponding protections.

C. Beyond Territoriality

As evidenced by the discussion above, a bird's-eye view of territoriality's role in U.S. law suggests that strict territoriality may not survive into the next century. This is not to say that territory no longer matters; it does. But territory no longer defines relationships in the way it once did, nor does territory pose the impenetrable barrier of sovereignty and exclusive jurisdiction idealized by Westphalian territorial preeminence. Territorial presence is thus no longer a consistently adequate proxy for fundamental indicators of membership. In territoriality's stead, a more flexible post-territorial membership approach is emerging in which constructive membership is not based on the fiction that territorial presence signifies de facto membership in a society but on actual indicators of membership—community ties and mutuality of obligation—as well as an effort to preserve the character of the national community. Courts are looking to the rationales that historically justified territoriality and evaluating membership with direct reference to those rationales. In that sense, territoriality is not dying; it is making a transformation to keep up with the realities of modernity. Thus, courts are now asking and will likely increasingly be asking whether an individual, or class of individuals, (1) has significant and substantial ties to the surrounding community, and (2) is subject to U.S. law in a way that triggers the U.S. government's reciprocal obligations. However, even where an individual does not seem to evidence these two indicators of membership, courts will need to evaluate whether denying rights will threaten the character of U.S. society.

The decline of territoriality poses some setbacks to advocates of immigrant rights. Territoriality's decline threatens to destabilize the historically equal treatment of all individuals, including unauthorized immigrants, within the U.S. territory. I sympathize with this concern: territoriality forms the basis of U.S. alienage law, a body of law that is characterized by marked inclusiveness. However, because the emerging

138. *Id.*
139. *Id.* at 2252.

post-territorial model values the very same principles that underlie territoriality, it should lead to the same inclusive results in virtually every instance.

Of course, the full development of this post-territorial model is still ahead, and it is especially important that alienage law scholars continue to explore the theoretical underpinnings of territoriality to help guide territoriality's transformation. Otherwise, territoriality may leave behind a void that courts may fill with the status-based model, which is exactly what has occurred in the realm of employment law.

III. TERRITORIALITY'S DEMISE IN THE EMPLOYMENT SPHERE: WHERE WORK AND BORDERS COLLIDE

At first glance, territoriality's role in the employment sphere appears unremarkable in light of territoriality's broader decline. As with the distribution of fundamental constitutional rights, territoriality has taken a progressively more limited role in the distribution of employment rights and benefits. However, in the employment sphere, territoriality is giving way to the status-based membership model rather than to the developing post-territorial model discussed above. Courts are increasingly relying on status, rather than indicators of de facto membership, to determine what rights and benefits should be afforded to workers. The status-based model's encroachment into the employment sphere represents a convergence of two separate spheres of membership in which lack of membership in one sphere—the immigration and border control sphere—dictates the distribution of membership rights in another—the employment sphere. I argue that, as posited by Michael Walzer, the immigration sphere should remain a separate sphere of distribution from internal spheres of distribution. I further argue that the employment sphere is particularly suited to application of the emerging post-territorial membership model because workers, whether documented or not, display all of the fundamental indicators of membership highlighted in *Plyler*, *Verdugo-Urquidez*, and other membership cases.

In this Part, I begin by tracing the historical role of territoriality in U.S. employment law. I describe the steady encroachment of the status-based model, focusing on the U.S. Supreme Court's opinion in *Hoffman* and its acceleration of territoriality's demise in the employment sphere. Next, I address the problems created by the status-based model's increasing role in the distribution of employment rights and benefits, arguing that courts' adoption of the status based model in the employment sphere improperly merges two unrelated spheres of membership. Specifically, I argue that status is not an adequate membership model in the employment sphere because it does not take

into account the fundamental indicators of membership according to which non-immigration-related rights and benefits have historically been distributed. Finally, I argue that undocumented workers are entitled to the same protections as their authorized counterparts by virtue of their membership in the employment sphere, regardless of their non-membership in the immigration sphere.

A. The Undocumented Worker: Life on the Border of Inclusion and Exclusion

For the *authorized* immigrant worker, the membership model governing the distribution of membership rights in the workplace is inconsequential. The authorized worker holds two trump cards: she is both authorized to live and work in the United States and she is present within U.S. borders. Regardless of the model employed, she is entitled to membership rights and benefits. For the undocumented worker, though, the membership approach employed matters a great deal. A strict territorial approach would grant her the same rights that documented immigrants have, while a status-based approach would afford minimal or no rights.

In the realm of employment law, no single model consistently governs the distribution of membership rights for undocumented immigrants. On the one hand, the undocumented worker's territorial presence ostensibly secures her all the same workplace protections to which documented workers are entitled. On the other hand, her undocumented status often limits, and in some cases eliminates, the remedies available for employment law violations. Thus, for the undocumented worker, the workplace lies on the border between inclusion and exclusion, rights and no rights, where territoriality and the status-based membership model conflict but coexist.

This disjointed view of undocumented worker membership has developed over the last several decades.[140] The passage of the Immigration Reform and Control Act (IRCA)[141] gave immigration status a greater role in the workplace itself.[142] However, as I argue below, it was the U.S. Supreme Court's 2002 decision in *Hoffman Plastic Compounds v. NLRB*[143] that definitively opened the door to the

140. For a comprehensive discussion of the interaction between immigration law and employment law prior to the enactment of IRCA, see Bosniak, *Exclusion*, *supra* note 22.

141. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

142. *See id.* (barring the employment of undocumented immigrants and prohibiting the use of fraudulent documents to obtain employment).

143. 535 U.S. 137 (2002).

encroachment, and potentially the dominance, of the status-based membership model in employment-related litigation.

1. FROM TERRITORIALITY TO A STATUS-BASED CONCEPTION OF MEMBERSHIP

Prior to 1986, U.S. immigration law demonstrated, "at best, evidence of a peripheral concern with employment of illegal entrants."[144] There was no provision prohibiting the employment of unauthorized workers.[145] In fact, while the concealment, harboring, or shielding from protection of an undocumented immigrant was illegal, the Immigration and Nationality Act (INA) specifically excluded the employment of an undocumented immigrant from the definition of those terms.[146]

In 1986, Congress enacted IRCA,[147] which the Supreme Court would later rely on as a basis for rejecting a strictly territorial approach to the distribution of employment-related rights.[148] In passing IRCA, Congress sought to neutralize the main incentive for unauthorized immigration: "as long as job opportunities are available to undocumented aliens, the intense pressure to surreptitiously enter this country or to violate status once admitted as a nonimmigrant in order to obtain employment will continue."[149] IRCA therefore imposes civil and criminal penalties on employers who knowingly hire or continue to employ unauthorized workers[150] and makes it a crime for an unauthorized worker to obtain work in the United States using fraudulent documents.[151] Notably, IRCA does not impose penalties on undocumented immigrants who obtain employment in the U.S. without fraud. The employer, in that situation, bore the burden of the penalty. Indeed, it was the employer sanctions that promised to be the most useful in curtailing unauthorized immigration:

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144. *De Canas v. Bica*, 424 U.S. 351, 360 (1976).

145. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892–93 (1984) ("For whatever reason, Congress has not adopted provisions in the INA making it unlawful for an employer to hire an alien who is present or working in the United States without appropriate authorization.").

146. 8 U.S.C. § 1324(a)(3) (2006); *Sure-Tan*, 467 U.S. at 892–93.

147. Pub. L. No. 99-603, 100 Stat. 3359 (1986).

148. *See Hoffman*, 535 U.S. at 151.

149. H.R. REP. NO. 99-682, pt. 1, at 56 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5649, 5660.

150. 8 U.S.C. § 1324(a)(2) (2006); § 1324a(e)(4)(A), (f)(1) (2006).

151. *Id.* § 1324c(a) (2006).

> [t]he principal means of closing the back door, or curtailing future illegal immigration, is through employer sanctions. . . . Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status . . . .[152]

Despite Congress's clear focus on the *employers* of undocumented workers, rather than the workers themselves, IRCA served as the catalyst for the rapid encroachment of a status-based model into the employment sphere under which undocumented workers would be effectively denied some employment rights.[153] Although most courts continued to hold that employment protections technically applied to undocumented workers, they hesitated to enforce those protections by awarding back pay.[154] The gap between an undocumented worker's nominal legal rights and the available remedies for a breach of those rights culminated in the Supreme Court's 2002 decision in *Hoffman*.[155]

The petitioner in *Hoffman*, Castro, had been fired from his job at the Hoffman chemical plant after Castro had engaged in union-organizing efforts,[156] an activity protected by the NLRA.[157] Castro filed a claim before the NLRB for back pay and reinstatement.[158] However, during the resolution of his claim, Castro admitted he was not authorized to work in the United States and that he had fraudulently

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152. H.R. REP. NO. 99-682, pt. 1, at 46 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5649, 5650.

153. *See Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1123 (7th Cir. 1992).

154. *Id.* at 1116–17, 1123. The NLRB continued to struggle with the issue of back pay for some time, finally deciding in 1995 that the undocumented worker in *A.P.R.A. Fuel Oil Buyers Group, Inc.* could receive back pay from the date of discharge until he obtained authorization to work in the U.S. or until a reasonable time to secure those documents had passed. *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 N.L.R.B. 408, 408 (1995). The Second Circuit affirmed the NLRB's decision, noting that the policies underlying the NLRA had not been altered by the passage of the Immigration Reform and Control Act. *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 52 (2d Cir. 1997). For a pre-*Hoffman* description and analysis of undocumented workers' access to remedies for employment law violations, see Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345 (2001) (calling for full remedies for undocumented victims of employment law violations and suggesting the grant of temporary work authorization to victims).

155. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2001).

156. *Id.*

157. The NLRA prohibits discrimination "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3) (2006).

158. *Hoffman*, 525 U.S. at 140–41.

obtained a Social Security card to secure employment.[159] The NLRB ultimately ordered Hoffman to compensate Castro for the work Castro would have performed from the time of his termination to the date that Hoffman learned of Castro's undocumented status.[160]

Although the Supreme Court did not deny that Castro was indeed technically protected by the NLRA,[161] it rejected the Board's attempt to reconcile an award of back pay with Castro's undocumented status: "The Board asks that we . . . allow it to award back pay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud."[162] The Court reasoned that awarding back pay would run counter to IRCA's underlying policy of "combating the employment of illegal aliens."[163] With the back pay award eliminated, Castro's only remedy (and Hoffman's only sanction) was the Board's order that Hoffman cease and desist from engaging in violations of the NLRA and that Hoffman post a notice of the Board's order at the plant.[164]

Justice Breyer's dissent took issue with the majority's finding that an award of back pay would conflict with the policies underlying IRCA.[165] Rather, the dissent explained, the *denial* of back pay might undercut Congress's efforts by incentivizing employers to hire

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159. *Id.* at 141.

160. *Id.* at 141–42.

161. *Id.* at 142–43. The question of whether an undocumented employee was protected under the NLRA had been unambiguously decided in *Sure-Tan Inc. v. NLRB*, 467 U.S. 883, 892 (1984). There, the Supreme Court employed a territorial conception of employment rights bolstered by a community preservation rationale. According to the Court, failure to afford employment rights to the undocumented would negatively affect working conditions for all employees: "[A]cceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions *of citizens and legally admitted aliens.*" *Id.* at 892 (quoting *De Canas v. Bica*, 424 U.S. 351, 356–57 (1976)) (emphasis added). Ultimately, the Court in *Sure-Tan* denied back pay to the claimants. *Id.* at 904–05. Subsequent lower court opinions differed on the Supreme Court's rationale for denying back pay, with some arguing that back pay was unavailable merely because the claimants had already left the boundaries of the United States to return to their home country. *See, e.g., Rios v. Enter. Ass'n Steamfitters Local Union 638 of U.A.*, 860 F.2d 1168, 1173 (2d Cir. 1988); *Bevles Co. v. Teamsters Local 986*, 791 F.2d 1391, 1193 (9th Cir. 1986). Others interpreted the Supreme Court's holding to categorically render undocumented immigrants ineligible for back pay. *See, e.g., Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1119 (7th Cir. 1992); *Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705, 725 (9th Cir. 1986).

162. *Hoffman*, 535 U.S. at 148–49.

163. *Id.* at 147, 149.

164. *Id.* at 152.

165. *Id.* at 153 (Breyer, J., dissenting) (5–4 decision).

undocumented workers.[166] The majority's holding, Justice Breyer argued, would lower the cost to the employer of labor law violations committed against undocumented workers, thereby making undocumented workers comparatively low-cost employees.[167] Placing the burden of unauthorized employment on Castro was clearly a departure from IRCA's intended focus on *employer* responsibility rather than *employee* responsibility.

The *Hoffman* majority opinion highlights the duality of the undocumented worker's position in the workplace. By holding that undocumented workers are "employees" covered under the NLRA,[168] the Supreme Court offered a measure of inclusion and membership to Castro and all undocumented workers. However, Castro's membership ended there. Castro's status as an undocumented immigrant foreclosed reinstatement and back pay.[169]

2. THE *HOFFMAN* EFFECT: NO-MAN'S-LAND AND BEYOND

Hoffman added a new dimension to employment law litigation. Employers have wielded *Hoffman* to pry into claimants' immigration status, aiming to reduce the potential remedy awarded or, at worst, hoping to intimidate undocumented workers from continuing litigation.[170] Employees who dare maintain their claims have faced employers' arguments that *Hoffman* left undocumented workers with few, if any, rights.[171] While *Hoffman* has not been the magic shield

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166. *Id.* at 155 (Breyer, J., dissenting).

167. *Id.* at 155–56 (Breyer, J., dissenting) (at the very least, it encouraged employers to "take risks, i.e., to hire with a wink and a nod those potentially unlawful aliens whose unlawful employment . . . ultimately will lower the costs of labor law violations").

168. *See* National Labor Relations Act, 29 U.S.C. § 152(3) (2006); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984).

169. *Hoffman*, 535 U.S. at 148–49. *But see NLRB v. C & C Roofing Supply, Inc.*, 569 F.3d 1096, 1099 (9th Cir. 2009) (allowed voluntary settlement to encompass lost wages in the form of liquidated damages, stating that this practice would not be in conflict with IRCA).

170. *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1074–75 (9th Cir. 2004) (discovery of immigration status was not permitted in determining liability but would be permissible in determining damages); *Perez-Farias v. Global Horizons, Inc.*, No. CV-05-3061-MWL, 2007 WL 1412796, at *3 (E.D. Wash. May 10, 2007) (protective order granted barring defendants questioning plaintiffs as to immigration status but evidence and independent investigation into immigration status was permissible); *Romero-Hernandez v. Alexander*, No. 3:08CV93-M-A, 2009 WL 1809484, at *6 (N.D. Miss. June 24, 2009); *Romero v. California Highway Patrol*, No. C05-03014 MJJ, 2007 WL 518987, at *1 (N.D. Cal. Feb. 14, 2007).

171. *See, e.g., King v. ZirMed, Inc.*, No. 3:05CV-181-H, 2007 WL 3306100, at *5 (W.D. Ky. Nov. 6, 2007) (employer claimed that because IRCA makes the

employers had hoped it would be, it has vastly altered the employment law landscape. Immigration status has now become a relevant factor in the distribution of employment rights.[172] Beyond foreclosing back pay and reinstatement in NLRA cases, courts have relied on *Hoffman* to limit the remedies available and sometimes eliminate all remedies in cases based on the Fair Labor Standards Act,[173] in Title VII discrimination and harassment claims,[174] in cases based on violations of state employment and tort law,[175] and in workers' compensation claims.[176] Perhaps signaling a more extensive encroachment of the status-based model into areas of law traditionally governed by the territorial model, immigration status has seeped into tort law litigation, with defendants claiming that an undocumented immigrant cannot be awarded compensatory damages for lost wages.[177]

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employment of undocumented immigrants illegal, employment contracts entered into by an undocumented immigrant are unenforceable).

172. *See, e.g., Renteria v. Italia Foods, Inc.*, No. 02 C 495, 2003 WL 21995190, at *6 (N.D. Ill. Aug. 21, 2003).

173. *Id. But see Flores v. Amigon*, 233 F. Supp. 2d 462, 464–65 (E.D.N.Y. 2002).

174. *See, e.g., Escobar v. Spartan Sec. Serv.*, 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003) (dismissing claimant's claims for back pay under Title VII because "such a remedy [is] foreclosed by the fact that he was an undocumented worker at the time he was employed").

175. *See, e.g., Madeira v. Affordable Hous. Found., Inc.*, 315 F. Supp. 2d 504, 507 (S.D.N.Y. 2004) (holding that, under state tort law, "alien status is relevant to determining whether lost earnings are appropriate and, if so, how much should be awarded" but reserving for jury the ultimate questions of whether claimant would have nonetheless obtained employment in the United States and what wages he would have earned); *Hernandez-Cortez v. Hernandez*, No. 01-1241-JTM, 2003 U.S. Dist. LEXIS 19780, at *16–19 (D. Kan. 2003) (in negligence claim, agreeing with defendants' concession that "plaintiffs are entitled to recover from the persons responsible for the physical injuries they sustain and for any impact on their ability to generate income *in their country of origin*") (internal quotations omitted) (emphasis added); *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 1002 (N.H. 2005) ("Generally, an illegal alien may not recover lost United States earnings."); *Crespo v. Evergo Corp.*, 841 A.2d 471, 472–73, 477 (N.J. Super. Ct. App. Div. 2004) (explaining that undocumented immigrant plaintiff making claim under New Jersey anti-discrimination law for illegal termination is barred from compensation: "it is the illegality of plaintiff's employment which precludes both economic and non-economic damages"); *Tyson Foods, Inc. v. Guzman*, 116 S.W.3d 233, 244 (Tex. App. 2003).

176. *Sanchez v. Eagle Alloy Inc.*, 658 N.W.2d 510, 520–21 (Mich. Ct. App. 2003), *leave to appeal granted*, 671 N.W.2d 874 (Mich. 2003), *order granting leave to appeal vacated*, 684 N.W.2d 342 (Mich. 2004); *Xinic v. Quick*, 69 Va. Cir. 295, 296 (Va. Cir. Ct. 2005).

177. *Veliz v. Rental Serv. Corp. USA*, 313 F. Supp. 2d 1317, 1322 (M.D. Fla. 2003).

a. Fair Labor Standards Act

Hoffman has secured the status-based model a role in claims arising under the Fair Labor Standards Act. As with cases brought under the NLRA, *Hoffman* has been interpreted to eliminate back pay and reinstatement as available remedies for an undocumented worker's successful FLSA claim.[178] In *Renteria v. Italia Foods, Inc.*,[179] for example, the Northern District of Illinois held that back pay and front pay (compensation for work that the employee, once reinstated, will perform in the future) were not available to an undocumented worker who had filed a claim under the Fair Labor Standards Act.[180] However, courts have uniformly declined to interpret *Hoffman* to foreclose a claimant from receiving payment for work already performed.[181] In *Flores v. Amigon*,[182] for example, the court granted a protective order precluding discovery of the plaintiff's immigration status in his claim for compensation for work already performed, holding that *Hoffman* did not apply to those circumstances.[183]

b. Title VII

Hoffman's effect on discrimination suits under Title VII of the Civil Rights Act of 1964[184] has varied, with some courts suggesting that a purely territorial approach, where the claimant's status is irrelevant, should apply.[185] In *Rivera v. NIBCO, Inc.*,[186] the Ninth Circuit, without deciding the issue, suggested that *Hoffman* was not applicable to Title VII claims.[187] There, twenty-three Latina and Southeast Asian immigrants with limited English proficiency challenged their employer's use of "basic job skills examinations," claiming that the

178. *See Renteria v. Italia Foods, Inc.*, No. 02 C 495, 2003 WL 21995190, at *6 (N.D. Ill. Aug. 21, 2003).

179. *Id.*

180. *Id.* at *6.

181. *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 325 (D.N.J. 2005); *Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002); *Flores v. Albertsons, Inc.*, No. CV0100515AHM, 2002 WL 1163623, at *5 (C.D. Cal. 2002).

182. 233 F. Supp. 2d 462 (E.D.N.Y. 2002).

183. *Id.* at 464–65; *see also Liu*, 207 F. Supp. 2d at 192–93 (S.D.N.Y. 2002); *Flores*, 2002 WL 1163623, at *5 ("*Hoffman* did not hold that an undocumented employee was barred from recovering unpaid wages for work actually performed.").

184. Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified at 42 U.S.C. §§ 2000e–2000e-17 (2006)).

185. *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1074–75 (9th Cir. 2004).

186. *Id.*

187. *Id.* at 1074–75, *cert. denied*, 544 U.S. 905 (2005).

exams had a disparate impact on them because of their national origin.[188] After being asked about their immigration status during a deposition, the plaintiffs sought a protective order precluding further discovery of the plaintiffs' immigration status, which was granted.[189] The Ninth Circuit affirmed the order: "We seriously doubt that *Hoffman* is as broadly applicable as [the employer] contends, and specifically believe it unlikely that it applies in Title VII cases."[190] According to the court, Title VII's reliance on private causes of action for enforcement, inclusion of full compensatory and punitive damages as available remedies, and its administration by federal courts instead of administrative agencies distinguished Title VII from the NLRA.[191] In addition, the court noted that it

> is the reasonably certain prospect of a back pay award that provide(s) the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.[192]

In other words, the court expressed concern that excluding undocumented immigrants from any Title VII remedies might erode working conditions for everyone—this is a classic self-preservation argument.

Other courts, however, have disagreed with *Rivera* and have extended the *Hoffman* rationale to Title VII claims. In *Escobar v. Spartan Security Service*,[193] the Southern District of Texas granted in part an employer's motion for summary judgment in a Title VII claim.[194] The court held that back pay was not available to a claimant who had been undocumented at the time of the sexual harassment, sexual discrimination, and retaliation alleged in his complaint but who

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188. *Id.* at 1061.

189. *Id.* at 1061–62.

190. *Id.* at 1067.

191. *Id.* at 1067–68.

192. *Id.* at 1069 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417–18 (1975)) (internal quotation marks omitted).

193. 281 F. Supp. 2d 895 (S.D. Tex. 2003). *See also De La Rosa v. N. Harvest Furniture*, 210 F.R.D. 237, 239 (C.D. Ill. 2002) (denying motion to compel discovery of Title VII claimant's immigration status while employed or after the employer's voluntary offer of reinstatement: "The only period for which immigration status *might* potentially be relevant is the period from [the unlawful termination until the employer's voluntary offer of reinstatement]").

194. *Escobar*, 281 F. Supp. 2d at 896.

had since gained authorization to work legally in the U.S.[195] However, the court suggested that other remedies, including reinstatement and front pay, might be available to the claimant.[196]

c. State employment law and tort cases

Not only has the *Hoffman* endorsement of the status-based approach altered the nature of federal employment law litigation, but it has also seeped into state tort and employment law. A federal district court in Florida held that the estate of an employee injured in a forklift accident could not recover lost U.S. wages in its claim against the forklift manufacturer and lessor.[197] Citing *Hoffman*, the court reasoned that lost wage compensation was sufficiently like the back pay denied in *Hoffman* for the court to find that immigration status precluded its award to an undocumented worker: "Awarding lost wages is akin to compensating an employee for work to be performed. This Court cannot sanction such a result."[198]

A New Jersey court affirmed summary judgment in favor of an employer who had fired an undocumented worker during the worker's maternity leave in violation of state employment law because "she just had a baby and people like her are irresponsible."[199] Relying on *Hoffman* and the similarities between the state law at issue and the NLRA, the court reasoned that the plaintiff's lack of authorization to work precluded both economic and non-economic damages for her termination.[200] Several courts have instead suggested that undocumented immigrants may only recover lost wages based on the prevailing wage in the immigrant's home country.[201]

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195. *Id.* at 897.

196. *Id.* ("As for the other remedies available under Title VII, including reinstatement and front pay, there is no authority cited by Spartan which directly addresses the availability of such remedies for an individual who was an undocumented worker at the time he was employed by the defendant, but who, following his termination, obtained legal work status in the United States.").

197. *Veliz v. Rental Serv. Corp. USA*, 313 F. Supp. 2d 1317, 1336–37 (M.D. Fla. 2003).

198. *Id.* at 1336.

199. *Crespo v. Evergo Corp.*, 841 A.2d 471, 473 (N.J. Super. Ct. App. Div. 2004).

200. *Id.* at 476–77.

201. *See, e.g.*, *Hernandez-Cortez v. Hernandez*, No. 01-1241-JTM, 2003 U.S. Dist. LEXIS 19780 (D. Kan. Nov. 4, 2003) (declining to bar undocumented immigrants from recovering future lost wages in negligence claim, but suggesting that their status may allow them to recover only "for any impact on their ability to generate income in their country of origin"); *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 1002 (N.H. 2005) (finding undocumented status relevant where an "illegal alien wish[es] to pursue a claim for lost earning capacity *measured at United States* wage

The Southern District of New York interpreted *Hoffman* to have a less restrictive effect on state law claims in *Madeira v. Affordable Housing Foundation*.[202] It held that undocumented status does not prevent a worker from recovering compensatory damages for employers' employment law violations.[203] It held that status was merely relevant to the amount of lost earnings that could be awarded, but noted that "the fact is, undocumented aliens do obtain work in the United States."[204] Other courts have rejected the notion that *Hoffman* has any bearing on state civil law claims and have allowed workers to recover lost wages they would have earned.[205]

d. Workers' compensation

Hoffman's effect on state workers' compensation cases has been mixed. While a few courts have denied undocumented workers access to all benefits, most have held that undocumented workers are entitled to at least some benefits.[206] In what is likely the most expansive view of *Hoffman*, a Virginia court ordered a workers' compensation claimant to respond to the employer's discovery request regarding immigration status.[207] Citing *Hoffman*, the court held that the claimant's immigration

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levels") (emphasis added). In *Sanango v. 200 East 16th Street Housing Corp.*, 788 N.Y.S. 2d 314 (N.Y. App. Div. 2004), the court concluded "that state tort law, to the extent it permits an undocumented alien to recover compensation for lost illegal wages as an element of damages, is preempted by IRCA pursuant to the Supremacy Clause of the United States Constitution. We are unaware, however, of any federal policy that would be offended by awarding an undocumented alien damages for lost earnings based on the prevailing wage in the alien's country of origin." *See id.* at 321. However, the New York's highest court later abrogated that holding in *Balbuena v. IDR Realty LLC*, 6 N.Y.S. 3d 338 (N.Y. App. Div. 2006).

202. 315 F. Supp. 2d 504, 507 (S.D.N.Y. 2004).

203. *Id.*

204. *Id.*

205. *See, e.g., Tyson Foods, Inc. v. Guzman*, 116 S.W.3d 233, 244 (Tex. App. 2004).

206. *See, e.g., Pontes v. New England Power Co.*, No. 0300160A, 2004 WL 2075458, at *3 (Mass. Super. Aug. 19, 2004) (denying motion to compel discovery of claimant's immigration status in workers' compensation case because status is not relevant); *Sanchez v. Eagle Alloy, Inc.*, 658 N.W.2d 510 (Mich. Ct. App. 2003) (limiting collection of lost wages to time period during which employer did not know of employee's undocumented status), *leave to appeal granted*, 671 N.W.2d 874 (Mich. 2003), *order granting leave to appeal vacated*, 684 N.W.2d 342 (Mich. 2004); *Cherokee Indus. v. Alvarez*, 84 P.3d 798 (Okla. Ct. App. 2003) (undocumented status does not foreclose alien from workers' compensation benefits but may render alien ineligible for specific remedy of vocation rehabilitation or medical treatment by a specific doctor); *Xinic v. Quick*, 69 Va. Cir. 295, 2005 WL 3789231 (Va. Cir. Ct. 2005) (stating that an undocumented alien cannot bring workers' compensation claim in Virginia).

207. *Xinic*, 69 Va. Cir. 295, 2005 WL 3789231.

status was relevant, not merely to the remedies available, but to the claimant's qualification to bring suit at all: "Essentially, Plaintiff's argument that he is entitled to make a workers' compensation claim, even if he is an illegal alien, is 'foreclosed by federal immigration policy. . . .'"[208] In this case, the court employed a status-based approach to both the question of remedies and the question of coverage.

Some courts have not discarded the territorial model in its entirety when it comes to workers' compensation. In *Sanchez v. Eagle Alloy*,[209] the Michigan Court of Appeals relied on *Hoffman* to hold that an undocumented immigrant, while an "employee" under the state workers' compensation statute, was not entitled to wage-loss benefits once the employer had discovered the claimant's undocumented status.[210] The court reasoned that the claimant's fraudulent use of false documents constituted a crime that prevented him from working.[211] Since Michigan law mandated suspension of wage-loss benefits for any period during which an individual could not work because of his commission of a crime, the claimant was not entitled to wage-loss benefits for any time after which his employer discovered his immigration status.[212]

Many courts have held that immigration status is completely irrelevant to workers' compensation claims.[213] The Supreme Court of Minnesota went so far as to hold that an undocumented immigrant could recover temporary total disability compensation even where the applicable statute conditioned such compensation on the worker

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208. *Id.* at *1. The court was unhindered by the relevant workers' compensation statute, which defined an "employee" as "[e]very person, including aliens and minors, in the service of another under any contract of hire . . . *whether lawfully or unlawfully employed* . . . ." VA. CODE ANN. § 65.2-101 (2007) (emphasis added).

209. 658 N.W.2d 510 (Mich. Ct. App. 2003), *leave to appeal granted*, 671 N.W.2d 874 (Mich. 2003), *order granting leave to appeal vacated*, 684 N.W.2d 342 (Mich. 2004).

210. *Id.* at 515, 518–19.

211. *Id.* at 521.

212. *Id.* Courts also often deny vocational rehabilitation on the grounds that an unauthorized worker has no legal right to a vocation in the United States. *See De Jesus Uribe v. Aviles*, No. B166839, 2004 Cal. App. Unpub. LEXIS 9698, at *13 (Cal. Ct. App. Oct. 26, 2004) (finding undocumented workers ineligible for vocational rehabilitation because such workers cannot legally resume work within the United States); *Cherokee Indus. v. Alvarez*, 84 P.3d 798, 801 (Okla. Civ. App. 2003) (suggesting that undocumented workers may be ineligible for vocational rehabilitation).

213. *See, e.g.*, *Pontes v. New England Power Co.*, No. 0300160A, 2004 WL 2075458, at *3 (Mass. Super. Aug. 19, 2004) (denying motion to compel discovery of claimant's immigration status in workers' compensation case).

engaging in a diligent job search.[214] The court rejected the argument that *Hoffman* required the court to determine that someone without authorization to work in the U.S. could not, by definition, perform a diligent job search.[215]

B. Fractured Membership

The fractured view of membership widely applied to the distribution of employment rights and benefits creates significant concerns on three levels. It leads to inconsistency and unpredictability, undermines immigration policy, and causes the convergence of the employment and immigration spheres in violation of Walzer's concept of complex equality.

1. INCONSISTENCY AND UNPREDICTABILITY

On a practical level, the current approach to the distribution of employment-related rights and benefits is inconsistent. Not only does the virtual lack of remedies completely undermine the supposed protection of undocumented workers, but it is inconsistent across jurisdictions and types of cases. While undocumented status forecloses back pay under the NLRA, it may be irrelevant for the award of lost wages under Title VII. One state may allow an undocumented worker to collect workers' compensation benefits, but another may exclude them altogether.

2. REVERSE INCENTIVES

Of course, abandoning territoriality and espousing a status-based model that fully excludes unauthorized workers from employment law protections would solve these practical problems. Such a scheme would be internally consistent and easily applied across jurisdictions and statutory schemes. Unauthorized workers would not be members at all, either nominally or by virtue of the enjoyment of rights, for all employment and labor law purposes. This solution even makes some intuitive sense on a policy level. After all, if unauthorized immigrants come to the U.S. for jobs, then making those jobs unappealing should reduce the flow of unauthorized immigration.

This logic, however, ignores the deplorable working conditions and minimal wages of the developing countries that supply the vast

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214. *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324, 329–30 (Minn. 2003).

215. *Id.* at 330–31.

majority of unauthorized immigrants to the U.S.[216] For many potential unauthorized immigrants, the absence of enforced labor protections is the status quo in their countries of origin,[217] and the impossibility of securing basic goods and services on the average salary in the developing world is enough to motivate unauthorized migration into the United States, where even wages well below minimum-wage requirements provide a substantially higher standard of living.[218] In fact, many unauthorized immigrants continue to migrate to the U.S. and remain here despite the severe abuses of unscrupulous employers who threaten revealing their unauthorized workers' status should they report their employer's violations of law. It is hard to imagine the extent to which working conditions and wages would have to deteriorate in order to neutralize the incentive for unauthorized immigration. Not only would such an effort be unpalatable, but it would be virtually impossible, and merely removing workplace protections (and thereby legalizing what some employers already do) would certainly be insufficient to significantly change the incentive structure.[219]

Rather, as courts and commentators have argued,[220] it is likely that exclusion of unauthorized immigrants from labor protections would

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216. *See* Brandie Ballard Wade, *CAFTA-DR Labor Provisions: Why They Fail Workers and Provide Dangerous Precedent for the FTAA*, 13 LAW & BUS. REV. AM. 645, 658–66 (2007) (comparing working conditions and wages of several signatories to the Dominican Republic-Central American Free Trade Agreement).

217. *Id.* at 649. *See also* Elizabeth Goergen, *Women Workers in Mexico: Using the International Human Rights Framework to Achieve Labor Protection*, 39 GEO. J. INT'L L. 401, 407–08 (2008) (calling for the enforcement of international human rights standards to remedy the Mexican government's failure to protect women from the sexual harassment and other sexual discrimination that runs rampant in the Mexican workplace); Stephen Zamora, *A Proposed North American Regional Development Fund: The Next Phase of North American Integration Under NAFTA*, 40 LOY. U. CHI. L.J. 93, 110, 116 (2008) (highlighting the wage disparity between the U.S. and Mexico, with the U.S. per capita income being six times higher than that of Mexico and approximately 20 million Mexicans living on less than $2.00 a day).

218. *See* Wade, *supra* note 216, at 649 (stating that "[t]he Mexican government approximated that more than half of the population makes less than the amount necessary to cover basic needs such as food, housing, and health care"); Zamora, *supra* note 217, at 118 (stating that "[p]overty in Mexico is the root cause of Mexican migration to the United States"). *See also* UNDERGROUND AMERICA, NARRATIVES OF UNDOCUMENTED LIVES (Peter Orner ed., 2008) (a collection of narratives from undocumented workers recounting the reasons they have come to the United States and their struggle to survive despite deplorable working conditions).

219. *See* Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, U. CHI. LEGAL F. 193, 211–13 (2007).

220. *See, e.g.*, Connie de la Vega & Conchita Lozano-Batista, *Advocates Should Use Applicable International Standards to Address Violations of Undocumented Migrant Workers' Rights in the United States*, 3 HASTINGS RACE & POVERTY L.J. 35, 48 (2005); O'Donovan, *supra* note 9, at 299–300, 302, 331; María Pabón López, *The*

instead *create* incentives for employers to continue hiring unauthorized workers—the very problem that Congress sought to address with IRCA. First, removing back pay as an available remedy for the violation of any employee's employment rights severely undercuts one of the main purposes of the NLRA and other labor law: to discourage employers from violating labor laws.[221] Without back pay, the NLRB is left with remedies that have no deterrent effect at all.[222] The remedies approved by the majority in *Hoffman*—an order that the employer cease and desist its illegal conduct and post a notice to employees of the NLRA violation—are a small price to pay for improper termination of an employee. With no remedy to enforce an ostensibly legally ensured right, employees will have little incentive to report their employers' labor-law violations—an incentive easily extinguished by their employers' threats to expose undocumented workers' legal status during litigation.[223] As a result, undocumented workers will have little option but to continue working under substandard conditions.[224]

This, in turn, encourages continued hiring of undocumented workers, a practice specifically prohibited by IRCA and ostensibly the very focus of IRCA.[225] The denial of back pay "lowers the cost to the employer of an initial labor law violation . . . . It thereby increases the employer's incentive to find and to hire illegal-alien employees"[226] or at least encourages employers to hire "with a wink and a nod those potentially unlawful aliens whose unlawful employment (given the Court's views) ultimately will lower the costs of labor law violations."[227]

Place of the Undocumented Worker in the United States Legal System After Hoffman Plastic Compounds*: An Assessment and Comparison With Argentina's Legal System*, 15 IND. INT'L & COMP. L. REV. 301, 302, 319 (2005).

221. *Hoffman Plastic Compounds Inc., v. NLRB*, 535 U.S. 137, 153–54 (Breyer, J., dissenting).

222. *Id.* at 154 (Breyer, J., dissenting).

223. *See, e.g.*, Nancy Cleeland, *Employers Test Ruling on Immigrant Worker Rights*, ASHEVILLE GLOBAL REP., Apr. 22, 2002, http://www.theglobalreport.org/issues/171/labor.html (reporting that the attorney of a New York meat market accused of violating minimum wage laws wrote to an advocacy group intending to demonstrate in front of the business, "I am sure you are aware of the ruling by the Supreme Court of the United States that illegal immigrants do not have the same rights as US citizens").

224. Richard A. Johnson, *Twenty Years of IRCA: The Urgent Need for an Updated Legislative Response to the Current Undocumented Immigrant Situation in the United States*, 21 GEO. IMMIGR. L.J. 239, 265 (2007) (cataloguing statistical evidence of the abuse and mistreatment of undocumented workers).

225. H.R. REP. NO. 99-682, pt. 1, at 46 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650.

226. *Hoffman*, 535 U.S. at 155.

227. *Id.* at 155–56.

In addition, the reverse incentives created by the failure to afford equal remedies to undocumented immigrants erode workplace standards for all employees, especially where undocumented workers compose a high percentage of the workforce. Where undocumented workers are readily available and easily coerced into remaining quiet about labor law violations, documented workers, too, will be reluctant to report those violations out of a fear of being replaced by an undocumented worker or as a result of pressure from undocumented co-workers who do not want to risk exposure of immigration status. Statistics suggest this dynamic may indeed be present: industries in which undocumented workers compose a high percentage of employees (which are often the most dangerous and lowest paying industries) exhibit a high incidence of wage and hour law violations.[228]

3. COLLISION OF SPHERES

Aside from creating an incentive structure that undermines both immigration and employment law, the encroachment of the status-based model into the employment sphere represents a convergence of two different spheres of membership. For the undocumented worker, a good distributed in the sphere of immigration law—formal status—dictates, for all practical purposes, access to a good distributed in another, internal sphere of distribution. In *Hoffman*, for example, status foreclosed back pay, the primary enforcement mechanism provided to secure an employee's right to participate in union-organizing activities.[229] Under Walzer's scheme of complex equality, this is permissible only if status has an intrinsic connection to labor and employment rights.[230]

a. Immigration and employment, disentangled

Admittedly, IRCA's explicit prohibition on the employment of an undocumented immigrant evidences at least Congress's collective opinion that employment and immigration are, to some extent,

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228. *See* Rebecca Smith et al., *Low Pay, High Risk: State Models Advancing Immigrant Workers' Rights*, 28 N.Y.U. REV. L. & SOC. CHANGE 597, 600 (2004) (reporting on U.S. Department of Labor surveys showing that "in 2000, 100% of all poultry processing plants were noncompliant with federal wage and hour laws; in 2001 almost half of all garment-manufacturing businesses in New York City failed to comply with Fair Labor Standards Act . . . overtime provisions; and in 1999 agricultural employers engaged in cucumber, lettuce, and onion harvesting had unacceptably low levels of compliance with FLSA and other worker protections").

229. *Hoffman*, 535 U.S. at 147, 149.

230. WALZER, *supra* note 16, at 19.

related,[231] and popular opinion certainly reflects the belief that undocumented immigrants cross U.S. borders to take jobs that belong to authorized workers.[232] In fact, IRCA's very purpose was to relieve "the intense pressure to surreptitiously enter this country or violate status once admitted as a nonimmigrant in order to obtain employment."[233]

However, the fact that employment in the U.S. serves as an incentive for undocumented immigrants does not necessarily dictate that documented status be a prerequisite for the enforcement of employment rights. If such a relationship were sufficient, U.S. law might deny the unauthorized immigrant medical assistance, educational opportunities, the right to marry, or any other benefit that could induce unauthorized migration. The relationship must be stronger. The question we ought to be asking is whether a lack of authorized status fairly indicates an individual's eligibility for membership—characterized by the enjoyment of rights—in the sphere of employment.[234] Does our conception of employment-related rights—the right to participate in union-organizing activities, collect a fair wage, and work in a discrimination-free environment, for example—turn on formal admission into the territory?

Arguably, Congress and many courts have already answered this question in the negative despite the growing convergence of the employment and immigration spheres. IRCA itself evidences a strong separation between the employment and immigration spheres. While IRCA penalizes an employer for hiring an undocumented immigrant,[235] IRCA is notably silent on the undocumented immigrant's acceptance of such employment.[236] Absent fraud, IRCA simply does not penalize an undocumented immigrant's acceptance of employment absent fraud.[237] Nowhere does IRCA exclude undocumented immigrants from federal labor and employment law protections as a result of unauthorized employment. Nowhere does IRCA strip undocumented workers of

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231. H.R. REP. NO. 99-682, pt. 1, at 46, *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650; H.R. REP. NO. 99-682, pt. 2, at 8–9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5757, 5757–58.

232. *But see* ALEJANDRO PORTES & RUBEN G. RUMBAUT, IMMIGRANT AMERICA: A PORTRAIT 15–16 (3d ed. 2006) (discussing a variety of motivations for immigration and challenging the presumption that "desperate poverty, squalor, and unemployment" are the driving force of immigration).

233. H.R. REP. NO. 99-682, pt. 1, at 45–46, *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650.

234. WALZER, *supra* note 16, at 22 (stating that "[n]o social good x should be distributed to men and women who possess some other good y merely because the possess y and without regard to the meaning of x").

235. 8 U.S.C. § 1324a(e)(4)–(5), (f) (2006).

236. O'Donovan, *supra* note 9, at 303; Wishnie, *supra* note 219, at 204.

237. 8 U.S.C. § 1324c(a) (2006).

employment rights by virtue of status. Rather, the statute provides very specific criminal penalties for employers and employees who violate its provisions.[238]

IRCA's legislative history strengthens the separation between the employment and immigration spheres. The House Judiciary Committee Report was fairly explicit in its separation of immigration law from employment law:

> It is not the intention of the Committee that the employer sanctions provisions of the bill be used to *undermine or diminish in any way labor protections in existing law* . . . . In particular, the employer sanctions provisions are not intended to limit in any way the scope of the term "employee" in . . . the National Labor Relations Act (NLRA) . . . . [A]pplication of the NLRA 'helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment.[239]

Similarly, the House Education and Labor Committee Report opined that no provision of IRCA,

> limit[s] the powers of State or Federal labor standards agencies such as the Occupational Safety and Health Administration, the Wage and Hour Division of the Department of Labor, he Equal Employment Opportunity Commission, the National Labor Relations Board, or Labor arbitrators . . . to remedy unfair practices committed against undocumented employees for exercising their rights . . . [t]o do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment. [240]

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238. 18 U.S.C. § 1015(e) (2006); *id.* § 1546(b) (2006) (providing for a fine and/or imprisonment of not more than five years for individuals who use or attempt to use fraudulent documents to obtain employment); 8 U.S.C. § 1324a(f)(1) (2006) (providing for a fine and/or imprisonment of not more than six months for employers engaging in a pattern or practice of violations).

239. H.R. REP. NO. 99-682, pt. 1, at 58, *reprinted in* 1986 U.S.C.C.A.N. 5757, 5662 (quoting *Sure-Tan Inc. v. NLRB*, 467 U.S. 883, 893 (1984)) (emphasis added).

240. H.R. REP. NO. 99-682, pt. 2, at 8-9, *reprinted in* 1986 U.S.C.C.A.N. 5757, 5758.

Courts, even those that have ultimately foreclosed undocumented workers from receiving back pay and other remedies, have agreed that undocumented immigrants are "employees" covered by federal and state employment laws.[241] No federal appeals court has held that undocumented status converts individuals into nonpersons outside the reach of the law.[242]

In effect, there is substantial agreement that undocumented immigrants are entitled, at least nominally, to labor and employment protections. This makes sense in light of the different purposes of employment and immigration law. Immigration law concerns the nation-state's power to control admission to the U.S. territory.[243] This sphere of distribution exists as a function of the state's power to deliberately define itself as a community, and so the state's consent directly relates to the good being distributed: status.[244] The employment sphere, however, is not driven by the state's power to admit individuals into the territory. Rather, it is driven by the necessity of protecting workers from the potential abuses of employers. Just as an individual's status does not make her an outlaw, her status does not strip her of her role as an employee.

b. The paradox, demystified

It is under-enforcement of employment rights—by limiting access to remedies—that interferes with the undocumented worker's widely acknowledge right to employment protections. Given the clear

241. In fact, the Supreme Court itself had specifically held that undocumented workers were "employees" for purposes of the NLRA. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891-92 (1984) (agreeing with the NLRB's claim that undocumented aliens are "employees" within the meaning of § 2(3) of the Act). Although *Sure-Tan* was decided before the passage of IRCA, the *Hoffman* Court failed to overrule that holding and instead limited its opinion to the availability of back pay. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2001) ("We hold that such *relief* is foreclosed by federal immigration policy" (emphasis added)). *See also id.* at 142-43 (describing the issue as one of remedies for an established violation: "This case exemplifies the principle that the Board's discretion to select and fashion remedies for violations of the NLRA, though generally broad, . . . is not unlimited" (citations omitted)).

242. *See, e.g., Agri Processor Co. Inc. v. NLRB*, 514 F.3d 1, 7 (D.C. Cir. 2008) ("The Supreme Court addressed only what remedies the Board may grant undocumented aliens when employers violate their rights under the NLRA. Nowhere in *Hoffman Plastic* did the Court hold that IRCA leaves undocumented aliens altogether unprotected by the NLRA."); *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1121 (7th Cir. 1992) (holding "that undocumented aliens are employees within the meaning of the NLRA," despite IRCA's prohibition on employment of undocumented immigrants, but declining to award back pay).

243. WALZER, *supra* note 16, at 31, 33.

244. *See id.*

separation between immigration law and employment law espoused by many courts and by Congress,[245] what accounts for courts' seemingly schizophrenic denial of remedies based on status? Why do employment rights often become rights without remedies for undocumented workers? *Hoffman*'s language suggests that the fractured membership of the undocumented immigrant is attributable to the difficulty of reconciling an undocumented immigrant's statutory right to employment protections with U.S. law's explicit prohibition on hiring undocumented immigrants.[246] After all, it seems paradoxical to prohibit the employment of undocumented immigrants but offer every employee, regardless of undocumented status, the protections and rights available to authorized employees. Such a scheme appears to reward individuals for engaging in unauthorized behavior. This tension between exclusion and inclusion is especially palpable in the context of back pay, which is based on the assumption that an undocumented immigrant would have continued unauthorized employment if not for an employer's illegal termination of employment.[247] Awarding back pay to an undocumented immigrant fulfills her expectation of unauthorized wages.[248]

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245. *See supra* Part III.B. *See also* Kati L. Griffith, *A Supreme Switch: The Supremacy Clause in the Wake of IRCA and* Hoffman Plastic Compounds, 41 CORNELL INT'L L.J. 127, 134 (2008) (analyzing the effect of IRCA and *Hoffman* on state labor and employment laws in terms of federal preemption, and arguing that the remedy of back pay bears no intrinsic link with immigration law such that IRCA preempts employment law protections for undocumented workers); Patrick D. Kenneally, *Protecting Court Borders: Fencing* Hoffman Plastic Compounds, Inc. v. NLRB *Out of Illinois Civil Courts*, 28 N. ILL. U. L. REV. 59, 68, 76 (2007) (emphasizing the "corrective justice" goal of state tort law as opposed to IRCA's purpose to "deflate the swell of undocumented immigration"); Maria L. Ontiveros, *To Help Those Most in Need: Undocumented Workers' Rights and Remedies Under Title VII*, 20 N.Y.U. REV. L. & SOC. CHANGE 607, 616 (1994) (arguing that IRCA's emphasis on employer conduct evidences the diverging purpose of IRCA and Title VII).

246. *See Hoffman Plastic Compounds*, 535 U.S. at 150–51 (noting that awarding back pay to the victim of an NLRA violation "trivializes the immigration laws" and "trench[es] upon explicit statutory prohibitions [against the employment of an undocumented worker] critical to federal immigration policy"). *See also* Beth Lyon, *Tipping the Balance: Why Courts Should Look to International and Foreign Law on Unauthorized Immigrant Worker Rights*, 29 U. PA. J. INT'L L. 169, 188–89 (2007) ("The notion of paying people back wages for work they would have been performing in violation of immigration laws simply seemed too permissive.").

247. *Hoffman Plastic Compounds*, 535 U.S. at 150 (arguing that an award of back pay presumes continued illegal presence in the U.S.: "Castro thus qualifies for the Board's award only by remaining inside the United States illegally").

248. Notably, the Supreme Court's opinion in *Plyler* assumes that undocumented children may remain in the U.S. without authorization to do so: "To be sure, like all persons who have entered the United States unlawfully, these children are subject to deportation. . . . But there is no assurance that a child subject to deportation will ever be deported." *Plyler v. Doe*, 457 U.S. 202, 226 (1982).

This is the fundamental paradox of territoriality and, more broadly, of complex equality. Under Walzer's conception of strict territoriality, the state's right to limit entry *into* the territory should not ordinarily preclude distribution of rights *within* the territory.[249] By stripping this axiom of its geography and applying it more abstractly, we can postulate that the state's right to limit entry *into* a particular sphere of distribution should not ordinarily preclude distribution of rights *within* that sphere of distribution. In other words, authorization to *enter* a sphere of distribution is a good in and of itself, separate from the very goods distributed *within* a sphere. This statement, while perhaps dissonant in its abstract formulation, is familiar it its practical application—this is not a new concept in U.S. law.

Child labor law serves as a useful and particularly relevant example. Like the undocumented worker, children—at least those under a certain age—lack the authorization to work under various state child labor provisions. Children, then, are not legally allowed to *enter* the employment sphere of distribution. However, once inside the employment sphere, regardless of how they have entered that sphere of distribution, children are widely entitled to all the same rights and benefits that their adult counterparts are entitled to. In fact, several state statutes provide for additional compensation to child victims of labor and employment law violations, in part because remedies for violations of labor and employment law serve as "punishment and deterrence of employers' illegal conduct."[250] Thus, the illegality of the employment relationship does not strip the child of her status as an employee. This remains the case even where the child has fraudulently obtained employment because "the critical focus is not upon the circumstances and conduct of the child, but rather upon the conduct of the employer."[251]

In *Schneider*, for example, a New Jersey court rejected an insurance company's argument that a thirteen-year-old boy who had lost his arm in a meat grinder was not covered under the employer's liability policy issued pursuant to state employment law.[252] In *American Belt Company v. Workers' Compensation Appeal Board*, neither party

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249. WALZER, *supra* note 16, at 31.

250. *Am. Belt Co. v. Workers' Compensation Appeal Bd.*, 755 A.2d 77, 81 (2000).

251. *Id.* at 82 (directing the lower court to determine whether the employer knew or should have known that he was hiring an underage worker even though underage worker had provided fraudulent identification). *See also Krutlies v. Bulls Head Coal Co.*, 94 A. 459, 460 (Pa. 1915) (awarding damages for a work-related injury to minor employee that had used fraudulent documents to secure employment).

252. *Nat'l Grange Mut. Ins. Co. v. Schneider*, 392 A.2d 641, 642, 644 (N.J. Super. Ct. Law Div. 1978).

questioned an illegally employed minor's entitlement to workers' compensation for the injuries she sustained when her arm was caught in a "knifelike" machine.[253] Rather, the issue was whether the employer was subject to the additional penalty provided by the workers' compensation statute for hiring an underage worker despite the young woman's fraud.[254]

In these cases, the courts' actions can be characterized in terms of separating spheres of distribution despite the perceived paradox it creates. A child's lack of entitlement to *enter* the employment sphere does not preclude her from enjoying the rights that pertain to that sphere of distribution once she is *in* it. While the rationales underlying child-labor laws are not the same as those underlying IRCA's prohibition on undocumented immigrants' employment, the child employment cases serve to illustrate my point: that an employment relationship, although illegal or unauthorized, is still an employment relationship.[255] This is especially true where, as with child-labor laws and IRCA's prohibition of the employment of undocumented immigrants, the burden of the illegal employment is intended to be borne by the employer rather than the employee.[256]

C. Work and Membership

The theoretical separation between immigration law and employment law does not, by itself, require the distribution of fully enforceable membership rights to undocumented workers. It merely precludes distributing employment rights based on status because there is no intrinsic relationship between status and the rights distributed in

253. *Am. Belt Co.*, 755 A.2d at 78.

254. *Id.* at 79.

255. For an interesting treatment of the meaning of "employment," see Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983 (1999) (drawing attention to the development of state child labor laws as evidence of a broader definition for employment that includes "suffer or permit" to work). *See id.* at 1030. *See also* H.R. REP. NO. 99-682, pt. 1, at 58 (1990), *reprinted in* 1986 U.S.C.C.A.N. 5757, 5662 ("In particular, the employer sanctions provisions are not intended to limit in any way the scope of the term 'employee' in . . . the National Labor Relations Act (NLRA)" (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984)).

256. *Compare American Belt Co.*, 755 A.2d at 82 ("In applying [state child labor laws], the critical focus is not upon the circumstances and conduct of the child, but rather upon the conduct of the employer.") *with New El Rey Sausage Co. v. INS*, 925 F.2d 1153, 1154 (9th Cir. 1991) (noting that IRCA "imposed a major change in immigration law by placing part of the burden of enforcement on employers" rather than on the immigrant worker).

the employment sphere. Thus, the question still remains: which membership model applies?

As I have explained above, there is a good argument that immigration status bears little relationship to the ability to enforce employment rights. Status seems an ill-suited indicator of membership in the employment sphere. Territoriality also fails as an accurate model of membership because, as courts arguably are already recognizing, its results are not consistent with some of its underlying rationales. Territorial presence no longer operates to reward community ties, as relationships are less dictated by geographic boundaries than they are by common interest, familial ties, cultural similarities, and commercial interests, all of which transcend political borders. Neither can territorial presence serve to define the limits of a state's power to act and obligation to protect individuals. States often exert governmental power outside political boundaries, weakening the argument that a government only has the power to protect individuals within its territory.

Courts outside of the employment sphere have recognized the problems with territoriality and have begun to look directly to the rationales underlying territoriality to sort members from nonmembers. I propose that the same be done in the employment sphere in order to more accurately distribute rights according to de facto membership in the employment sphere itself.

Under the developing post-territorial approach to membership, undocumented workers, as a category, are members of the employment sphere entitled to the full distribution of membership rights available in that sphere. First, undocumented workers have significant affiliations with their surrounding community. Their employment, alone, ensures the existence of these ties. Undocumented workers contribute to a collective effort and add value to an enterprise.[257] Their employers and the broader economy rely on undocumented workers to perform what are often undesirable and dangerous tasks that few authorized workers care to perform.

Second, the principle of mutuality of obligation, particularly as it appears in *Boumediene*, which emphasized the relevance of the

257. In fact, for many scholars, work represents much more than community ties—it represents a commitment to democratic principles and a sense of responsibility and obligation to the community. *See, e.g.*, Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 529 (1997) (arguing that "the values of liberty and equality are interwoven essentials of our national union" and "[b]y understanding some of the relations of work to community, perhaps we can better appreciate the interdependence of citizens"); Vicki Schultz, Essay, *Life's Work*, 100 COLUM. L. REV. 1881, 1886 (2000) (arguing that social justice depends on equal access to paid work because "work has been fundamental to our conception of the good life. It has been constitutive of citizenship, community, and even personal identity").

government's de facto authority over the claimants,[258] further suggests that undocumented workers, despite their lack of work authorization, are members entitled to full membership rights. On one level, the only law that applies to undocumented workers in the United States is U.S. law, and the government should not be allowed to impose obligations upon undocumented immigrants without also affording corresponding protections. But on a more specific level, the relationship between employee and employer is one of reciprocal obligations. An employee subjects herself to the requirements and instructions of an employer on the assumption that the employee will abide by legally imposed standards. To allow an employer to circumvent these standards by denying undocumented immigrants certain remedies is to approve of the employer's refusal to fulfill its reciprocal obligations to an employee—it allows employers to govern employees without legal constraint.

Third, and perhaps most importantly, the failure to enforce the rights of the undocumented worker is likely to create a sub-caste of workers without enforceable rights. Aside from leaving a group of residents without full legal recourse for blatant violations of employment rights, this threatens our societal norms of equal rights in the workplace and ultimately endangers the rights of authorized workers and citizens. Absent full protection for undocumented workers, employment standards could be weighed down by the sheer number of undocumented immigrants working under sub-par conditions. A bifurcated system of employment protections in which one group enjoys more remedies than the other cannot be sustained for long; it brings to mind Jefferson's warning "that the friendless alien has indeed been selected as the safest subject of a first experiment; but the citizen will soon follow."[259]

CONCLUSION

Although unauthorized immigration poses a significant challenge to immigration and border control in the United States, our reaction to undocumented immigrants, once integrated into our social fabric, arguably presents a more complicated question. What do we owe those who have surreptitiously crossed our borders and have accepted jobs that are expressly off limits? Do we owe them anything?

The United States cannot make up its mind on this question. As I have described at length, undocumented workers are almost universally

258. *See Boumediene v. Bush*, 128 S. Ct. 2229, 2251 (2009); *see also supra* Part II.B.

259. THOMAS JEFFERSON, 7 THE WRITINGS OF THOMAS JEFFERSON 303 (Paul Leicester Ford ed., 1896).

covered by most employment statutes. Employers are required, by law, to maintain legally accepted working conditions for all employees, regardless of status. Undocumented workers are entitled to fair wages, to a discrimination-free working environment, and to many other employment protections. However, undocumented workers are barred in many instances from enforcing those rights with certain remedies, including back pay, on the theory that by being here illegally, undocumented immigrants can have no expectation of earning future wages in the United States. In that sense, a status-based conception of membership is displacing the territorial conception of membership that has traditionally dominated matters of alienage law.

The decline of territoriality is not unique to the employment sphere. Geography has decreasing importance to the distribution of membership outside of the employment sphere. Courts have been willing to depart from strict territoriality to extend rights beyond U.S. borders and deny rights within U.S. borders. Instead of relying on an individual's location, courts outside of the employment sphere are asking more fundamental questions about membership. They are evaluating an individual's community ties, the surrounding community's obligations to the individual, and the risk of altering the character of the community by denying rights. In essence, courts are turning directly to the rationales that underlie the territorial model and finding that the territorial model does not always lead to results consonant with its own rationales. In the divergence from strict territoriality and the increased scrutiny of territoriality, I have identified the seeds of a new, post-territorial model emerging outside the employment sphere.

Within the employment sphere, however, the demise of territoriality has not paralleled the trajectory of territoriality outside of the employment sphere. In the employment sphere, territoriality is not undergoing the same transformation apparent outside the employment sphere. Instead, the status-based model is encroaching upon and displacing territoriality. I have argued that this trajectory poses serious concerns. Not only does the denial of remedies based on status conflict with the purposes of immigration and employment law, but it represents an unwarranted collision of the immigration and employment spheres. As I have argued, these spheres are and should remain separate and should distribute goods, including rights, without reference to an individual's membership in the other sphere. Rather, under the post-territorial approach emerging outside of the employment sphere, undocumented immigrants are members of the employment sphere and entitled to the full enforcement of their rights.

My conclusions in this Article are not the end of the inquiry. Rather, I have offered a new way of thinking about the undocumented

worker in the United States—I have depicted the plight of the undocumented worker in terms of membership and belonging. I have also attempted to give a larger context to questions surrounding undocumented workers, and more broadly, undocumented immigrants. My hope is that analyzing the undocumented worker through the lens of membership may help illuminate the difficult path that lies ahead as the United States engages in immigration reform and makes difficult decisions about who belongs and what belonging here means.

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